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CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

TED ENGLE, Superintendent,
Chillicothe Correctional Institute,
Petitioner,
v.
LINCOLN ISAAC,
Respondent.

E.P. PERINI, Superintendent,
Marion Correctional Institution,
Petitioner,
v.
KENNETH L. BELL
Respondent.

TED ENGLE, Superintendent,
Chillicothe Correctional Institute,
Petitioner,
v.
HOWARD HUGHES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE "CAUSE" REQUIREMENT OF *WAINWRIGHT V. SKYES*, 433 U.S. 72 (1977) FOR OBVIATING A STATE PROCEDURAL WAIVER MAY BE FOUND WHERE A FAILURE TO OBJECT TO AN INSTRUCTION PLACING THE BURDEN OF PROOF ON A CRIMINAL DEFENDANT OF THE AFFIRMATIVE DEFENSE OF SELF DEFENSE IS PREDICATED SOLELY ON THE FACT THAT THE DEFENDANT'S TRIAL OCCURRED PRIOR TO A STATE COURT DECISION WHICH RETROACTIVELY AND SOLELY AS A MATTER OF STATE LAW ELIMINATED THE DEFENDANT'S TRADITIONAL COMMON LAW ULTIMATE BURDEN ON AFFIRMATIVE DEFENSES.

2. WHETHER THE "PREJUDICE" REQUIREMENT OF *WAINWRIGHT V. SYKES, SUPRA*, FOR OBVIATING A STATE PROCEDURAL WAIVER MAY BE FOUND BY CONSTRUING, CONTRARY TO THE STATE COURT'S OWN INTERPRETATION OF ITS LAW, A STATE COURT DECISION ELIMINATING A DEFENDANT'S TRADITIONAL COMMON LAW ULTIMATE BURDEN ON AFFIRMATIVE DEFENSES TO CREATE A FUNCTIONAL ELEMENT OF THE CRIME OF "ABSENCE OF THE AFFIRMATIVE DEFENSE".

Parties

In addition to the parties listed on the front cover of this petition, the Ohio Prosecuting Attorneys Association appeared as amicus on behalf of petitioner (then appellee) Engle in *Issac v. Engle*, F. 2d , (No. 78-3488, 6th Cir. 1980) upon rehearing en banc. The Ohio Public Defenders Association and the Appellate Review Office, a subdivision of the clinical program of the School of Law of the University of Akron appeared as amici for respondent (then appellant) Isaac.

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OPINIONS BELOW

The decision of The United States Court of Appeals for The Sixth Circuit in *Isaac V. Engle,* F. 2d (No. 78-3488, 6th Cir. 1980), upon rehearing en banc is not yet reported. (A 1). The panel decision of The United States Court of Appeals For The Sixth Circuit in *Isaac v. Engle, supra* is not reported (A24). The decision of the United States District Court For The Southern District of Ohio, Eastern Division in *Isaac v. Engle,* is unreported. (A38).

The decision of The United States Court of Appeals For The Sixth Circuit in *Bell v. Perini,* F. 2d , (No. 79-3153, 6th Cir. 1980) is not yet reported. (A42). The decision of the United States District Court For The Northern District of Ohio, Western Division in *Bell v. Perini,* is not reported. (A49).

The decision of The United States Court of Appeals For The Sixth Circuit in *Hughes v. Engle,* (No. 79-3570) is unreported. (A60). The decision of the United States District Court For The Northern District of Ohio, Eastern Division in *Hughes v. Engle* is unreported. (A62).

JURISDICTION

The panel decision of The United States Court of Appeals For The Sixth Circuit in *Isaac v. Engle, supra* was entered February 8, 1980. (A24). Rehearing en banc was granted March 24, 1980. (A36). The en banc decision in *Isaac v. Engle, supra* was entered December 12, 1980 (A1).

The decision of The United States Court of Appeals For The Sixth Circuit in *Bell v. Perini, supra* was entered December 12, 1980 (A42).

The decision of The United States Court of Appeals For The Sixth Circuit in *Hughes v. Engle, supra* was entered December 18, 1980 (A60).

Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Rev. Code (Page's) Section 2901.05A (eff. 1-1-74)

> (A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused.

Ohio Rev. Code (Page's) Section 2901.05A(Eff. 11-1-78)

> (A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

STATEMENT OF THE CASE

Isaac

Isaac was found guilty in a jury trial in Pickaway County, Ohio of aggravated assault, a lesser included offense of felonious assault for which he had been indicted. On September 15, 1975, Isaac was sentenced to a term of imprisonment of from 6 months to 5 years. During his trial, Isaac relied upon an affirmative defense of self defense. No objection was entered to an instruction that Isaac bore the burden of proof on self defense by a preponderance of the evidence.

Subsequent to conviction, Isaac appealed to the Court of Appeals of Pickaway County, Ohio. Therein, Isaac relied on the newly decided case of *State v. Robinson*, 47 Ohio St. 2d 103 (1976). In *Robinson*, the Ohio Supreme Court concluded as a matter solely of state statutory law that O.R.C. Section 2901.05(A)(eff. 1-1-74) changed the traditional common law preponderance burden of proof on affirmative defenses to require that a defendant only have the burden of coming forward with sufficient evidence to create an issue as to the affirmative defense.[1] The State then bore the burden of proof beyond a reasonable doubt, not only as to the statutory elements of the crime, but also as to the non existence of the affirmative defense. The Court of Appeals affirmed Isaac's conviction on the basis that he had failed to object to the instruction given.

Isaac further appealed to the Ohio Supreme Court which denied relief on July 20, 1977. On the same day, the Ohio Supreme Court decided *State v. Humphries*, 51 Ohio St. 2d 95 (1977) holding that although the interpretation of O.R.C. Section 2901.05(A) worked by *Robinson* was fully applicable to all trials conducted after January 1, 1974, the effective date of the statute, a defendant who had not objected to the charge on that basis would be precluded from relief.

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[1]In reaction to the *Robinson* decision, the Ohio legislature amended O.R.C. Section 2901.05, effective November 1, 1978, to return to the common law preponderance standard.

On March 31, 1978, Isaac filed a petition for writ of habeas corpus with the United States District Court For The Southern District of Ohio, Eastern Division. Therein Isaac alleged as his sole proposition the failure of the Ohio Courts to apply the *Robinson* decision to his case. The district court, on June 26, 1978 denied the petition, "because the record clearly establishes that petitioner waived his constitutional claim by failing to present it to the trial court". (A41).

Upon appeal, a panel of The United States Court of Appeals For The Sixth Circuit, on February 8, 1980, voted to reverse. (A24). The majority found error on the basis that the selective denial by the Ohio Supreme Court of the benefits of the *Robinson* decision was itself arbitary and capricious and thus a denial of due process. (A26). As such, the majority did not consider the question of whether the instruction itself was a violation of due process. (A31). The concurrence (A33) found error on the basis that the statutory interpretation of *Robinson* had redefined the burden of proof in constitutional terms. (A34). Rehearing en banc was granted on March 24, 1980. (A36).

The decision on rehearing en banc was entered December 12, 1980 and resulted in a 4 member plurality, 2 one judge concurrences and 3 separate dissents representing the votes of 4 judges. (A1). The plurality found error in that *Robinson* created a functional element of "absence of the affirmative defense" which the State was then required to disprove. (A9). Chief Judge Edwards in concurrence was of the view that due process per se requires negation by the State of self defense (A10) and Judge Jones in a separate concurrence expressed approval of the panel decision. (A12). In dissent, Judge Lively disputed the contention of the plurality that Ohio had created a new "element" of the crime. (A16). Judge Engel joined in this opinion as clarified by a subsequent order of the court (A23). Judges Merritt and Kennedy in separate dissents (A20) and (A21) would have found waiver by the failure to object.

On December 31, 1980, the Court granted a stay of the mandate pending certiorari to this Court. (A37).

Bell

Bell was found guilty in a jury trial in Cuyahoga County, Ohio of murder, a lesser included offense of aggravated murder for which had had been indicted. On April 8, 1975, Bell was sentenced to a term of imprisonment of from 15 years to life. Like Isaac, Bell relied upon the affirmative defense of self defense and failed to object to the traditional jury instruction that he bore the burden of proof as to such defense by a preponderance of the evidence.

Subsequent to conviction, Bell appealed to the Court of Appeals of Cuyahoga County, Ohio and the Ohio Supreme Court raising issues not pertinent herein. Said appeals were respectively denied on April 8, 1975 and September 16, 1976.

Thereafter, Bell filed a petition for writ of habeas corpus with the United States District Court For The Northern District of Ohio, Western Division. As a sole ground for relief, Bell raised for the first time, a due process challenge to the instruction on self defense.

On December 26, 1978, the district court issued an opinion and order denying the petition on the merits. (A49). On January 23, 1978, the district court issued a second opinion and order denying Bell's motion for reconsideration. (A56).

Upon appeal, The United States Court of Appeals For The Sixth Circuit on December 12, 1980, reversed on the authority of the en banc decision in *Isaac*. (A42). On December 31, 1980, the appellate Court granted a stay of the mandate pending certiorari review. (A48).

Hughes

Hughes was found guilty in a jury trial in Summit County, Ohio of the crime of voluntary manslaughter, a lesser included offense of aggravated murder for which he had been indicted. On January 27, 1975, Hughes was sentenced to a term of imprisonment of from 6-25 years. Like Isaac and Bell, Hughes relied on self defense at trial and raised no objection to an instruction that he bore the burden of proof of the affirmative

defense of self defense by a preponderance of the evidence. In fact, Hughes' counsel specifically requested the charge that was given.

Subsequent to conviction, Hughes appealed to the Court of Appeals of Summit County, Ohio and the Ohio Supreme Court. Said appeals were respectively denied on September 24, 1975 and March 16, 1976, both in advance of the decision in *Robinson.* No contention was made in either appeal that the instructions on self defense violated due process.

On April 26, 1977, Hughes filed a petition for writ of habeas corpus with the United States District Court For The Northern District of Ohio, Eastern Division. Therein, Hughes challenged the constitutionality of the instruction on self defense.

On June 26, 1979, the district court, after interim orders requesting briefing on exhaustion of state remedies and the merits, issued its opinion denying the petition. (A62). The district court found alternatively that Hughes' burden shifting claim was waived by failure of objection and that the instruction itself did not violate federal due process.

On December 18, 1980, The United States Court of Appeals For the Sixth Circuit reversed on the basis of the *Isaac* decision. (A60). A motion to stay the mandate pending certiorari was granted on January 21, 1980. (A61).

Status of the Parties

During the interim of proceedings in the courts below, Hughes and Isaac were granted final releases as a matter of parole and thus have served their sentences. The action as to them proceeds only with respect to the collateral consequences of reversed convictions. Bell is still in prison and a "live" case is still in existence. In addition, approximately 25 pending "live" actions now exist in the appellate and district courts for which motions to stay issuance of decision are pending. The decisions in *Isaac, Bell* and *Hughes* are potential precedent for the release of every Ohio prisoner between 1974-1978 who relied on affirmative defenses.

ARGUMENT IN SUPPORT OF CERTIORARI

The instant cases present novel, complex, and important issues of both federal constitutional law and federal state relationships. As characterized by Chief Judge Edwards, concurring in *Isaac:*

> Few cases in the history of this Court have resulted in as much soul-searching thought and debate as has this case.

(A10). While obviously important to the State of Ohio, it is not just the fact of the number of prisoners who will be released under the authority of these cases—primarily homicides—or even the multiplicity and lack of uniformity of the opinions of the Court below—six separate opinions on rehearing en banc in *Isaac*—that demands review and reversal. Rather it is the misapplication of this Court's decision in *Wainwright v. Sykes, supra* and the lower court's reconstruction of Ohio's definition of the elements of crime that present issues of national importance. Utilizing the criteria of "cause" and "prejudice", as outlined in *Wainwright,* the petition will demonstrate not only the need for further clarification in these areas but that the instant cases present the proper factual and legal parameters for such resolution. In this regard, it should be noted that the United States Court of Appeals For The Fourth Circuit—also on rehearing en banc—is in conflict with the en banc decision in *Isaac. Cole v. Stevenson,* 620 F. 2d 1055 (4th Cir. 1980).

I. WHETHER THE "CAUSE" REQUIREMENT OF *WAINWRIGHT V. SYKES,* 433 72 (1977) FOR OBVIATING A STATE PROCEDURAL WAIVER MAY BE FOUND WHERE A FAILURE TO OBJECT TO AN INSTRUCTION PLACING THE BURDEN OF PROOF ON A CRIMINAL DEFENDANT OF THE AFFIRMATIVE DEFENSE OF SELF DEFENSE IS PREDICATED SOLELY ON THE FACT THAT THE DEFENDANT'S TRIAL OCCURRED PRIOR TO A STATE COURT DECISION WHICH RETROACTIVELY AND SOLELY AS A MATTER OF STATE LAW ELIMINATED THE DEFENDANT'S TRADITIONAL COMMON LAW ULTIMATE BURDEN ON AFFIRMATIVE DEFENSES.

Prior to 1974, Ohio followed the traditional common law view that a defendant bore the ultimate burden of proof by a preponderance of the evidence when an affirmative defense

like insanity, self defense or duress was raised. *State v. Seliskar*, 35 Ohio St. 2d 95 (1973). The traditional instruction outlined the statutory elements of the crime, the state's burden of proof beyond a reasonable doubt as to such elements, the factors constituting the affirmative defense and the defendant's burden, and the repeated admonition that the failure of the defendant to meet his burden on the affirmative defense did not relieve the state of its ultimate burden of proof as to the elements of the crime. In each of these cases, the traditional instruction was given.

In 1974, Ohio enacted O.R.C. Section 2901.05, which as interpreted in *Robinson* relieved the defendant of this historic obligation of burden of proof, substituting instead merely a "burden of production". In a real sense, the decision was not foreshadowed either by the terms of O.R.C. Section 2901.05 nor interim decisions of the Ohio Supreme Court. In *State v. Rogers*, 43 Ohio St. 2d 28, 33 (1975), decided after O.R.C. Section 2901.05 had been enacted but prior to *Robinson*, the Ohio Supreme Court stated:

> The defense of using reasonable force to effect a citizen arrest necessarily involves an allegation of excuse or justification and is, therefore, an affirmative defense (R.C. 2901.05[c] [2]) which places the burden of going forward with the evidence upon the accused (R.C. 2901.05[A]) to prove that issue by a preponderance of the evidence.

As a result, few Ohio counsel objected to the traditional instruction. It is from this factor that the appellate court found "cause" under *Wainwright*.

In *State v. Humphries, supra*, the Ohio Supreme Court found as a matter of state law that the failure to object would be deemed a procedural waiver of a *Robinson* claim. Therein, the Court specifically relied upon prior direction by this Court that a subsequent decision is not per se "cause" sufficient to overcome the normal contemporaneous objection rule:

> The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error.

Hankerson v. North Carolina, 432 U.S. 233, 244 n. 8 (1977). In *Hankerson*, this Court held *Mullaney v. Wilbur*, 421 U.S. 684

(1975) to be fully retroactive. The above statement was made in reaction to the state's concern that such holding would substantially undermine the finality of convictions entered prior to *Mullaney*. In reliance on such holding, Ohio has consistently found the *Robinson* error not to be "plain error". *State v. Williams*, 51 Ohio St. 2d 112 (1977); *State v. Long*, 53 Ohio St. 2d 91 (1978). The holding of the appellate court below is a direct rejection of the direction given in *Hankerson*.[8]

The majority in the panel decision in *Isaac* dismissed the quoted portion of *Hankerson* as mere "dicta" (A27) and found Ohio's reliance on it to be arbitrary and capricious. (A31). This created an anomoly for the appellate court as that court had flirted with the very same proposition:

> As stated above, unless we accord retroactive application to the *Mauro* decision no violation of the IAD occurred in the present case. In light of our conclusions that appellant waived any IAD claim he may have had and that Section 2255 is not an appropriate vehicle to raise appellant's IAD claim, we need not decide whether *Mauro* should receive retroactive application.

Mars v. United States, 615 F. 2d 704, 707 (6th Cir. 1980). Moreover, since *Hankerson*, this Court has consistently re-affirmed that portion quoted above. *Lee v. Missouri*, 439 U.S. 461 (1979); *Harlin v. Missouri*, 439 U.S. 459 (1979). It was for this reason the plurality en banc in *Isaac* found the majority panel decision to be an unsatisfactory basis of decision. (A5).

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[8]The finding of "cause" in these cases allowed the appellate court to bypass a more direct challenge to *Wainwright* itself. In prior decisions of the Sixth Circuit a substantial number of judges have expressed the view that a federal court may review an alleged error if the state court system has a plain error review mechanism—even if the state court has specifically rejected that it is plain error under that system. See specifically: *Hockenbury v. Sowders*, 633 F. 2d 433 (6th Cir. 1980); see also: *Berrier v. Egeler*, 583 F. 2d 515 (6th Cir. 1978); *cert. denied*, 439 U.S. 955; *Canary v. Bland*, 583 F. 2d 887 (6th Cir. 1978); *Cook v. Borderkircher*, 602 F. 2d 117 (6th Cir. 1979) *cert. denied*, 444 U.S. 936; *Rachel v. Bordenkircher*, 590 F. 2d 200 (6th Cir. 1978); *Krzeminski v. Perini*, 614 F. 2d 121 (6th Cir. 1980). Such view of *Wainwright* undercuts the purpose of the decision—to make the trial itself the main component of the criminal system and not a forerunner of later discovered collateral claims. It also runs contrary to this Court's admonition in *Henderson v. Kibbe*, 431 U.S. 145 (1977) that challenges to a state court's instructions require a greater showing than "plain error".

Relying on *O'Connor v. Ohio*, 385 U.S. 95 (1966), the plurality en banc in *Isaac* found cause in the "futility" of counsel making an objection in light of well settled law (A 6). Aside from the fact that counsel in *Robinson* did make the objection and was successful on appeal, the present case is not *O'Connor*. In *O'Connor*, trial took place prior to the time that the constitutional provision relied upon had even been applied to the states. Here, O.R.C. Section 2901.05 had been enacted, and *Mullaney* and *In re Winship*, 397 U.S. 358 (1970) had been decided. Thus, while the decision may not generally have been anticipated, it was not unanticipatable.

The problem with the plurality's analysis is that it relieves counsel from any obligation to attempt to change the law and removes any possibility of waiver. Presumably if the objection is well known, the failure to make it will be deemed ineffectiveness of counsel. *Beasley v. United States*, 481 F. 2d 687 (6th Cir. 1974). On the other hand, if the objection is not perceived until a subsequent decision is rendered, then "cause" is found in the lack of anticipation. Such interpretation renders *Wainwright* a nullity.

In dissent, Judge Kennedy correctly stated:

> If, as this court holds, a change in interpretation of the law provides "cause" for a defendant's failure to object at trial sufficient to satisfy the cause and prejudice exception of *Wainwright*, then the impact on the administration of justice of making that interpretation retroactive can never be mitigated by application of the state's contemporaneous objection rules. I do not believe that the suggestion in *Hankerson* to the contrary can be so freely ignored.

(A22) See also: *Cole v. Stevenson, supra*. As the appellate court "freely ignored" *Hankerson*, certiorari should be granted.

II. WHETHER THE "PREJUDICE" REQUIREMENT OF *WAINWRIGHT V. SYKES, SUPRA*, FOR OBVIATING A STATE PROCEDURAL WAIVER MAY BE FOUND BY CONSTRUING, CONTRARY TO THE STATE COURT'S OWN INTERPRETATION OF ITS LAW, A STATE COURT DECISION ELIMINATING A DEFENDANT'S TRADITIONAL COMMON LAW ULTIMATE BURDEN ON AFFIRMATIVE DEFENSES, TO CREATE A FUNCTIONAL ELEMENT OF THE CRIME OF "ABSENCE OF THE AFFIRMATIVE DEFENSE".

In *Carter v. Jago*, F. 2d (No. 79-3317, 6th Cir. 1980), (A), the same appellate court as decided the cases sought to be reviewed herein held in a pre 1974 trial, that the traditional common law instruction on the affirmative defense of self defense does not impermissably shift the burden of proof on the elements of crime. See also: *Krzeminski v. Perini, supra* at 124:

> *Patterson* makes it clear that so long as the jury is instructed that the state has the burden of proving every element of the crime beyond a reasonable doubt, there is no due process violation. The state may properly place the burden of proving affirmative defenses such as self defense, extreme emotional disturbance or insanity upon the defendant.

This holding creates the bottom line analysis that a trial in Ohio in 1973 with the same instruction as given in these cases is constitutionally fair, whereas in these cases the instruction is constitutionally unfair. That the time parameters of the trial should make a difference in constitutional terms underscores the error of the court below.

In *Carter*, the appellate court correctly analyzed the dichotomy between this Court's decisions in *Mullaney, supra* and *Patterson v. New York*, 432 U.S. 197 (1977). In *Mullaney*, the state had presumed the very factor—malice—which made a distinction between degrees of culpability as defined by the state law whereas in *Patterson*, the state bore the burden of proof as to each element of the crime and nothing required for a finding of criminal liability was presumed. See also: *Rivera v. Delaware*, 429 U.S. 877 (1976); *State v. Frost*, 57 Ohio St. 2d 121 (1979). The traditional instruction that failure of the affirmative defense did not relieve the state of its burden of proof as to the elements of the crime drew the same dichotomy. No element of the crime was presumed.

To reconcile the fact that the instruction given is not per se violative of due process (But Cf Judge Edward's concurring opinion and Judge Merritt's dissent A10, 20)[3] the plurality in *Isaac* held that the enactment of O.R.C. Section 2901.05 in 1974 created a functional element of the crime of "absence of the affirmative defense."

> As we read *Mullaney* and *Patterson*, while the states are largely free to define crimes as they choose, fundamental fairness and therefore due process require that they prove the elements of the crimes as the states have chosen to define them beyond a reasonable doubt. We further conclude that once a state assumes the burden of proving the absence of an affirmative defense beyond a reasonable doubt, fundamental fairness and therefore due process require it to meet the burden that it chose to assume.

(A 9). Simply stated, the court converted a change in the burden of proof with respect to an affirmative defense into an additional element of crime not included within the statutory definition of that crime. In so doing, the appellate court violated the admonition of this Court in *Mullaney, supra* at 691:

> . . . that state courts are the ultimate expositors of state law, . . . and that we are bound by their constructions except in extreme circumstances not present here.

Self defense has traditionally been an affirmative defense under the law of Ohio. As such, the existence or non existence of the defense is collateral to the elements of crime:

> This court has consistently recognized that there are certain "justification(s) for admitted conduct" allowed to a defendant in a criminal case, provable for the most part under the plea of not guilty, which are referred to as "affirmative defenses". As characterized by one authority, they represent not a mere denial or contradiction of evidence which the prosecution has offered as proof of an essential element of the crime charged, but rather, they represent a substantive or independent matter" which the defendant claims exempts him from liability even if it is conceeded that the facts claimed by the prosecution are true". Among those defenses in Ohio are self defense, duress, insanity, and intoxication.

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[3]The *Carter* court rejected the notion that due process requires the negation of self defense:

> Allowing a State to treat self defense as an affirmative defense is consistent with the concerns expressed in *Patterson* for allowing the legislature branch sufficient latitude to define mitigating factors that affect criminality.

(A82) Thus, while noted in *Patterson* that some limits may be placed on a legislature's definition of crime, making self defense an affirmative defense is not violative of this principle.

State v. Poole, 33 Ohio St. 2d 18, 19 (1973). Nothing in the enactment of O.R.C. Section 2901.05 in 1974 changed the characterization of self defense as an affirmative defense. While *Robinson* was intended to lessen the defendant's obligation to raise the affirmative defense, it still remains collateral to the question of whether the elements of the crime have been proved.

That the appellate court chose to rewrite Ohio law is most clearly seen by their failure to even cite *State v. Abner*, 55 Ohio St. 2d 251 (1978). In *Abner*, the Ohio Supreme Court rejected the contention that a defendant under *Robinson* was entitled to a specific instruction on the state's burden to disprove the absence of self defense. By doing so, the Ohio Supreme Court reaffirmed that even under *Robinson* self defense is an affirmative defense, not an element of the crime. As found by Judge Lively in dissent:

> The jury does not reach a defense of self defense until it finds that all elements of an offense have been established beyond a reasonable doubt.

(A18).

Petitioners do not minimize the notion that changing the burden of proof on the affirmative defense of self defense may in some cases alter the outcome of a trial. The question before the Court however is whether the trial of these respondents was fundamentally unfair. While *Robinson* adopted a benefit for defendants to the extent it lessened their burden on the affirmative defenses, *Robinson* was itself not constitutionally required. *Carter v. Jago, supra.* As such, the appellate court below found prejudice in the failure of the state courts to apply a state statutory and non constitutionally required benefit. Such holding reflects a misperception of the role of a federal court upon habeas corpus—to correct errors of constitutional dimension. As the court below reached its result by rejecting the Ohio Supreme Court's own construction of its law, certiorari should be granted.

CONCLUSION

In *Wainwright v. Sykes*, this Court adopted a standard of "cause and prejudice" for reviewing whether a state procedural waiver would be an independent state ground precluding review. Little direction was given to the lower courts as to the definition of cause and prejudice and as illustrated by these cases, the lower appellate courts have struggled to give meaning to such phrases. As the instant cases present a viable model in which to further define "cause" and "prejudice", certiorari should be granted. As the decision of the court below is erroneous on both "cause and prejudice" reversal is required. By that means, Ohio will not suffer the vacation of numerous final and fundamentally fair convictions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b), Rules of the Supreme Court, I hereby certify that the requisite number of copies of the foregoing petition for writ of certiorari have been served on respondents Lincoln Isaac, Kenneth Bell, and Howard Hughes by forwarding such copies to the offices of their respective counsel, James R. Kingsley, 157 W. Main Street, Circleville, Ohio 43113 and Jay McKirahan, Suite 330, 22 East Gay Street, Columbus, Ohio 43215, counsel for Isaac; Richard L. Aynes, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325, counsel for Bell; and J. Dean Carro, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325, counsel for Hughes, by U.S. Mail, postage paid, this day of February, 1981. I further certify that all parties required to be served have been so served. The respondents' addresses are Lincoln Isaac, 310 Ray Avenue, Circleville, Ohio 43113; Kenneth Bell, #141-727, Marion Correctional Institution, P.O. Box 57, Marion, Ohio 43302, Howard Hughes, c/o Beasley Surles, 163 Rhodes Avenue, Akron, Ohio 44302.

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APPENDIX

Isaac v. Engle, F. 2d (No. 78-3488, 6th Cir. 1980), Opinion, December 12, 1980 (en banc.) A1

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No. 78-3488

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LINCOLN ISAAC,
Petitioner-Appellant,
vs.
TED ENGLE, Superintendent,
Respondent-Appellee.

On Appeal from the United States District Court for the Southern District of Ohio, Eastern Division.

[Decided and Filed December 12, 1980]

Before: Edwards, Chief Judge; Weick, Lively, Engle, Keith, Merritt, Brown, Kennedy, Martin and Jones, Circuit Judges, sitting *En Banc*.

Brown, Circuit Judge, delivered the opinion of the Court in which Weick, Keith, and Martin, Circuit Judges, concurred; Edwards, Chief Judge (p. 12) and Jones, Circuit Judge (pp. 13-16) delivered separate concurring opinions, and Lively, Circuit Judge (pp. 17-21), Merritt, Circuit Judge (p. 22) and Kennedy, Circuit Judge, (pp. 23-25) delivered dissenting opinions.

Bailey Brown, Circuit Judge. In this appeal, we are confronted with the difficult task of determining the federal constitutional consequence, if any, of two decisions by the Supreme Court of Ohio. One of these decisions for the first time construed an Ohio statute to place the burden on the state in criminal cases of proving the absence of affirmative defenses, and the other decision held that only those defendants who had objected at the trial to jury instructions placing the burden on defendant to prove an affirmative defense could avail themselves on appeal of this interpretation of the statute.

I

Prior to 1974, Ohio followed the traditional common law rule that the defendant in a criminal case not only had the

burden of going forward with evidence to create an issue as to an affirmative defense but also had the ultimate burden of proving such affirmative defense by a preponderance of the evidence. *State v. Seliskar*, 35 Ohio St. 2d 95 (1973). As of January 1, 1974, however, a new statutory provision became effective. That provision, codified as Ohio Revised Code Section 2901.05(A), stated:

> (A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused.

The language of the new statute was not free of ambiguity. As a result Section 2901.05(A) was not initially considered to effect any change in the previous common law rule. As late as 1975, the Supreme Court of Ohio reaffirmed at least in a dictum the principle that a defendant must bear the burden of proving affirmative defenses by a preponderance of the evidence. *State v. Rogers*, 43 Ohio St. 2d 28 (1975).[1]

II

In 1975, appellant, Lincoln Isaac, was indicted in Ohio for felonious assault. At his trial, Isaac asserted that he had acted in self-defense. The trial court instructed the jury without any objection by Isaac that it was incumbent on Isaac to demonstrate self-defense by a preponderance of the evidence. The jury found Isaac guilty of the lesser included offense of aggravated assault. Isaac was sentenced to a term of six months to five years imprisonment.

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[1] In *Rogers*, the Ohio Supreme Court stated:

> The defense of using reasonable force to effect a citizen arrest necessarily involves an allegation of excuse or justification, and is, therefore, an affirmative defense (R.C. 2901.05[C] [2]) which places the burden of going forward with the evidence upon the accused (R.C. 2901.05[A]) to prove that issue by a preponderance of the evidence. See *State v. Seliskar, supra*, 35 Ohio St. 2d 95, 298 N.E. 2d 582.

Prior to any appeal by Isaac, the Supreme Court of Ohio, in *State v. Robinson*, 47 Ohio St.2d 103 (1976), concluded that Section 2901.05(A) had changed the previously accepted common law rule allocating the burden of proof in criminal cases. The court construed Section 2901.05(A), effective January 1, 1974, to adopt the majority rule that a defendant only has the burden of coming forward with sufficient evidence to create an issue as to an affirmative defense and that once such evidence is presented, the prosecution then must demonstrate beyond a reasonable doubt the guilt of the defendant even to the extent of disproving such affirmative defense. Interpreting Section 2901.05(A) in this manner, the Supreme Court of Ohio held that any jury instruction placing the burden of proving an affirmative defense on the defendant constituted prejudicial error.

Relying on *Robinson*, Isaac appealed his conviction. The Court of Appeals for Pickaway County held that Isaac had waived any error in the jury instruction on burden of proof by failing to object to that instruction. Accordingly, it affirmed Isaac's conviction. Isaac thereafter filed an appeal in the Supreme Court of Ohio. That appeal was dismissed in 1977 for lack of a substantial constitutional question.

On the same day that it dismissed Isaac's appeal, the Supreme Court of Ohio reaffirmed the interpretation of Section 2901.05(A), placing the burden on the state to prove absence of affirmative defenses, that it had made in *Robinson*. *State v. Humphries*, 51 Ohio St.2d 95 (1977). At the same time, however, the court held that appellant Humphries could not avail himself of this interpretation of the statute because he had not objected to the charge to the jury on this ground, relying on Ohio Criminal Rule 30. The court, nevertheless, in the same opinion, held that appellant Meyer, who had had a bench trial, could effecitvely raise the question on appeal since Criminal Rule 30 did not apply to such trials. Ohio has continued to so apply its contemporaneous objection rule. *State v. Long*, 53 Ohio St.2d 91 (1978).

In 1978, Isaac sought habeas corpus relief in federal district court. Without reaching the merits of Isaac's claim, the district court dismissed his petition. The court, relying on *Wainwright v. Sykes*, 433 U.S. 72 (1977), held that federal habeas corpus

review was precluded by an adequate state procedural ground, specifically, the Ohio rule that the failure to object to a jury instruction waived any error in such instruction.

In *Isaac v. Engle*, F.2d (decided February 8, 1980) a panel of this court reversed the decision of the district court, Judge Celebrezze writing a concurring opinion. The focus of the panel opinion was on the constitutionality of Ohio's use of its contemporaneous objection rule as a means of limiting the benefits of the *Robinson* decision. The panel opinion concluded, preliminarily, that *Wainwright v. Sykes* was simply not applicable and therefore there was no bar to consideration of this constitutional claim since such claim was not directed at the substantive validity of the jury instructions allocating the burden of proof. As to the merits of the claim, all three members of the panel determined that Ohio's failure to grant Isaac the benefits of *Robinson* represented a denial of due process. The panel divided, however, as to the appropriate basis for reaching such a conclusion. Judges Peck and Phillips determined that Ohio's use of its contemporaneous objection rule was arbitrary and capricious and therefore a denial of federal due process under the circumstances of this case because there was no basis for objection to the jury instruction at the time of Isaac's trial. Judge Celebreeze, adopting a somewhat broader approach, maintained that the placing of the burden of proof is so critical in the truth-finding process that the change in interpretation of the law allocating that burden must have "retroactive application" without any limitations based on state procedural rules.

We granted a petition for rehearing *en banc* to consider the important issues presented by this case.

III

We recognize that the use of a contemporaneous objection rule as a procedural device to deny a defendent the retro active benefits of an important change in state law is arguably arbitrary and capricious when there did not exist a reasonable basis for an objection at the time of the trial. The Supreme Court, however, has at least suggested that such a use of a procedural rule may be a valid means of limiting the retro-

active benefit of a new constitutional principle. *Hankerson v. North Carolina*, 432 U.S. 233, 244 n. 8 (1977). Moreover, as a matter of comity, states are entitled to some deference in the manner that they apply their own procedural rules. We are therefore hesitant to hold, as did the panel opinion, that this use of a contemporaneous objection rule to limit the retroactive benefits of a new statutory interpretation is, *ipso facto*, violative of due process.

We believe that the more appropriate focus is on the underlying claim, in this case the constitutional validity of the jury instructions given at Isaac's trial as considered in light of *Robinson* and *Humphries*. In this context, the threshold question, then, is not whether the state's limiting of the retroactive benefits of a new statutory interpretation through the use of a procedural rule is constitutional but whether that state procedural rule effectively precludes federal habeas corpus review of the underlying constitutional claim.

IV

In *Wainwright v. Sykes*, 433 U.S. 72 (1977), the Supreme Court held that a petitioner's failure to comply with a state procedural rule represents an independent and adequate state ground barring habeas corpus review of a constitutional claim absent a showing of cause for the noncompliance and a showing of prejudice resulting from the constitutional violation.[2] The Court, however, declined to define precisely what would constitute "cause" and "prejudice." That task was left for development in subsequent cases. While the "cause" and "prejudice" standards of *Wainwright* still remain somewhat undefined, we conclude that the circumstances of this case satisfy both of those standards.

At the time of Isaac's trial, there was no indication that the jury instruction given by the trial court was contrary to state law. Ohio had traditionally placed the burden of proving

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[2] *See also Hockenbury v. Sowders*, F. 2d , No. 79-3339 (6th Cir. April 17, 1980).

affirmative defenses on the defendant. Moreover, the Supreme Court of Ohio had in a dictum stated that the recently enacted statute, Ohio Revised Code Section 2901.05(A), did not change the previous common law rule. *See State v. Rogers, supra.* Confronted with such well-established law, it would have seemed futile for Isaac to object to a jury instruction allocating to the defendant the burden of proving self-defense. A defendant cannot be expected to predict a change in the interpretation of state law when the law is so well-established and there has been no hint of a change in that law. *See O'Connor v. Ohio,* 385 U.S. 92 (1966). Moreover, it was not, as will be seen hereafter in dealing with the merits of Isaac's constitutional claim, until the later decision of the Supreme Court of Ohio in *Robinson, supra,* interpreting Ohio Revised Code Section 2901.05(A) as placing the burden on the state to prove the absence of affirmative defenses, could Isaac know that the charge to the jury violated federal due process. Therefore, Isaac had legitimate cause for his failure to object to the jury instruction allocating the burden of proof.

The resulting prejudice is clear. The burden of proof is a critical element of the fact-finding process in a criminal trial. *See In re Winship,* 397 U.S. 358 (1970). An error in the allocation of that burden, here shifting from the state its burden of proving absence of self-defense beyond a reasonable doubt to the defendant to prove self-defense by a preponderance of the evidence, profoundly affects the basic fairness of a defendant's trial. In such cases, prejudice may be presumed. *Rachel v. Bordenkircher,* 590 F.2d 200 (6th Cir. 1978).[3]

Having found both "cause" and "prejudice," we are not precluded under *Wainwright v. Sykes, supra,* from considering whether it was a denial of due process to place on Isaac the burden of proving that he had acted in self-defense.

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[3]Since at trial Isaac by his testimony made a substantial issue as to his self-defense contention, he was in fact prejudiced by the court's charge to the jury and therefore Isaac need not rely on such presumption.

V

In *In re Winship*, 397 U.S. 358, 364 (1970), the Supreme Court held that due process requires that the prosecution prove beyond a reasonable doubt "every fact necessary to constitute the crime." The underlying principle of *Winship* is clear. A heavy burden of proof must be imposed in criminal cases in order to minimize the chances of innocent persons being convicted. But while its principle is clear, the application of *Winship* has proved somewhat difficult in determining to what extent the prosecution must prove the absence of any affirmative defenses raised by a defendant.

In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Supreme Court held unconstitutional a Maine law placing on the defendent the burden of proving that, in killing a person, he had acted in the heat of passion. The Court seemed to suggest that a state could not, consistent with due process, shift to the defendant the burden of demonstrating any fact which decreased the degree of culpability. Under this interpretation of *Mullaney*, the prosecution would be required to prove beyond a reasonable doubt the absence of any affirmative defense raised by the defendant, regardless of whether that affirmative defense negated an element of the crime as defined by state law.

Such a broad interpretation of *Mullaney* was rejected in *Patterson v. New York*, 432 U.S. 197 (1977). In that decision, the Court upheld the validity of a New York statute allocating to the defendant the burden of proving that he had killed a person while he was under the influence of extreme emotional distress, saying:

> We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of

> all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.

Id. at 210.

We construe *Mullaney* and *Patterson* together to hold that due process requires that a state prove all elements of the crime as the state has defined the crime, that there are due process limits on the extent to which a state may shift the burden to defendant by the way in which it defines crimes, but that a state may, consistent with due process, place the burden on defendants to prove defenses that have traditionally been treated as affirmative defenses if such defense does not negate an element of the crime. *Krzeminski v. Perini*, 614 F. 2d 121 (6th Cir. 1980).

VII

The indictment charged Isaac with felonious assault under Ohio Revised Code Section 2903.11. This crime is defined by the statute as follows:

> Felonious assault
> (A) No person shall knowingly:
> (1) Cause serious physical harm to another

However, Isaac was convicted of the lesser included offense of aggravated assault under Ohio Revised Code Section 2903.12. This crime is defined by the statute as follows:

> Aggravated assault
> (A) No person, while under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force, shall knowingly:
> (1) Cause serious physical harm to another

At trial it was Isaac's contention that he was not guilty of any crime because he had acted in self-defense. In this connection the trial court charged the jury, stated succinctly, that, in order to establish this defense, it was necessary that he show by the preponderance of the evidence that, in striking the other party, Isaac reasonably believed that such action was necessary to protect himself from great bodily harm.

The defense of self-defense as defined in the charge to the jury at Isaac's trial does not negate an element of the crime of felonious assault or aggravated assault as such are defined in Ohio Revised Code Section 2903.11 and Section 2903.12. This is true since one could act knowingly (felonious assault) or knowingly and while under extreme emotional distress brought on by serious provocation reasonably sufficient to incite him into using deadly force (aggravated assault), and yet act in self-defense. Moreover, while according to *Mullaney* and *Patterson*, as we have noted, there are due process limits to the extent to which a state may redefine the elements of a crime and thereby reallocate the burden of proof to the defendant, *Patterson* holds that in failing to make absence of self-defense an element of the crimes of felonious or aggravated assault as defined in Section 2903.11 and Section 2903.12, Ohio did not violate due process.

Although the statutes defining felonious and aggravated assault did not make absence of self-defense an element of the crime, it is arguable that, in enacting the statute that was construed to place the burden on the state of proving absence of self-defense, Ohio had so made it an element of the crime. In *State v. Humphries, supra*, at 111, one of the Ohio justices did say that, in so construing Ohio Revised Code Section 2901.05(A), absence of affirmative defenses had been made an element of the crimes. (Locher, J., concurring in part and dissenting in part). We believe, however, that, under *Mullaney* and *Patterson*, the proper question to ask is: Can Ohio, having by statute assumed the burden of proof with respect to absence of self-defense, consistently with due process convict a defendant by applying a different and lesser standard of proof.

As we read *Mullaney* and *Patterson*, while the states are largely free to define crimes as they choose, fundamental fairness and therefore due process require that they prove the elements of the crimes, as the states have chosen to define them, beyond a reasonable doubt. We further conclude that, once a state assumed the burden of proving the absence of an affirmative defense beyond a reasonable doubt, fundamental fairness and therefore due process require it to meet the burden that it chose to assume. From the point of view of fairness and due process, there is no practical difference

between requiring a state to prove the elements of crimes beyond a reasonable doubt and requiring it to meet its assumed burden of proving absence of affirmative defenses beyond a reasonable doubt. Thus we conclude that, in Isaac's trial, placing the burden on him to prove self-defense by a preponderance of the evidence constituted a denial of federal due process.

VII

Following the decisions of the Supreme Court of Ohio in *Robinson* and *Humphries*, the Ohio legislature amended Ohio Revised Code Section 2901.05(A) so as to readopt the common law rule that a defendant must prove any affirmative defense by a preponderance of the evidence. On any retrial, Isaac is entitled to jury instructions consistent with Ohio law in 1975 as construed in *Robinson*. Any other result would give *ex post facto* effect to the 1978 amendment of Section 2901.05(A). *See Breest v. Helgemoe*, 579 F. 2d 95 (1st Cir.), *cert. denied*, 439 U.S. 933 (1978); *United States v. Williams*, 475 F. 2d 355 (D. C. Cir. 1973).

Accordingly, the judgment of the district court is reversed and the case is remanded. The district court is directed to order that Isaac be released from custody unless Ohio chooses to retry him within a reasonable time to be determined by the district court.

Edwards, Chief Judge, concurring. Few cases in the history of this court have resulted in as much soul-searching thought and debate as has this case. I write to express concurrence in the result reached by Judge Bailey Brown's opinion for the majority of the en banc court. In my view, however, under *In re Winship*, 397 U.S. 358 (1970), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975), cited with approval and distinguished on the facts in *Patterson v. New York*, 432 U.S. 197 (1977), the due process clause of the United States Constitution commands that the burden of proof of criminal intent—clearly an element of Ohio's aggravated assault law—be placed on the prosecution. Here the burden of proof of self-defense was definitely placed on the defendant. Criminal intent of aggravated assault and self-defense are, in my view, completely irreconcilable. To

require a defendant to carry the burden of proof on self-defense is to require him to disprove criminal intent.[1]

As to the retroactivity and the cause and prejudice issues discussed by the Supreme Court in *Wainwright v. Sykes*, 433 U.S. 72 (1977); *see also Hankerson v. North Carolina*, 432 U.S. 233 (1977), I join fully in Judge Brown's careful analysis showing that Isaac is entitled to a new and fair trial.

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[1]A full understanding of this record has convinced me that this case is not a satisfactory medium for decision of the difficulties inherent in the collision between Ohio's tangled laws pertaining to self-defense and federal due process standards as exemplified in *In re Winship*, *Mullaney v. Wilbur*, and *Patterson v. New York*. A motion to vacate the motion for en banc consideration as improvidently granted has, however, failed.

Jones, Circuit Judge Concurring.

I concur in the result. A majority of the *en banc* Court agrees on only one point: that Isaac's imprisonment is in violation of due process of law. This result was reached by the original panel. The *en banc* Court does not agree on precise issues to be decided as well as their correct resolution. I reluctantly write separately because I believe that the plurality opinion does not provide a rationale to support its conclusion and to explain my disagreement with Judge Lively's and Judge Kennedy's dissenting opinions.

I.

Ohio Rev. Code Ann. Section 2901.05(A) became effective on January 1, 1974. In 1976 the Ohio Supreme Court held that Section 2901.05(A) required defendants only to proffer evidence sufficient to raise the affirmative defense of self-defense. *State v. Robinson*, 47 Ohio St. 2d 103, 351 N.E.2d 88 (1976). Isaac was convicted in 1975. At Isaac's trial the jury was instructed that defendant had the burden of *proving* the affirmative defense of self-defense. Isaac did not object to such a jury instruction. The decision in *State v. Humphries*, 51 Ohio St.2d 95, 364 N.E.2d 1354 (1977) limits the retroactive application of *Robinson* to defendants who objected to the jury instruction at trial requiring defendants to prove self-defense. Isaac's petition for a writ of habeas corpus challenges only the use of Ohio's contemporaneous objection rule to deny him the benefit of the retroactive application of *Robinson*.

II

The plurality opinion defines the issue to be decided as whether Ohio can convict a defendant by applying a different or lesser standard of proof than that required by statute. The plurality opinion holds that it is "unfair" for a state not to meet the burden of proof assumed by it. However, we are not told the reasons *why*.

The Ohio Supreme Court justified applying a "different or lesser standard of proof" than that required by statute because Isaac failed to object to the jury instructions at trial. *State v. Humphries, supra.*

The contemporaneous objection rule presupposes the existence of an alleged error to be corrected. Isaac's jury instructions were in accord with well-settled Ohio law at the time of his trial. Thus, the panel's decision held that Ohio's use of the contemporaneous objection rule in Isaac's case did not have a "real and substantial relation to the ends sought to be attained by the use of" such a rule. This approach recognizes that state judicial decisions as well as state legislative determinations are subject to due process scrutiny. This analysis also implicitly recognizes that a state's failure to follow its own procedural rules raises due process claims cognizable under 28 U.S.C. Section 2254.

The concurring panel opinion stated that Isaac's jury instructions could have been objected to at trial on the principal enunciated in *Mullaney v. Wilbur,* 421 U.S. 684 (1975).[1] However, it correctly relied upon *Hankerson v. North Carolina,* 432 U.S. 233 1977, to hold that a state cannot deny full retroactive effect to a change substantially affecting the truth-finding process of a criminal trial.

The plurality opinion rejects these two plausible rationales, but offers none in their place.[2]

III.

Judge Lively's dissent contends that the *Robinson* court's interpretation of Section 2901.05(A) to require defendants *only* to proffer evidence sufficient to raise a defense of self-defense "merely reduces the quantum of proof necessary to

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[1] *See* discussion of *Mullaney* in part III, *infra.*

[2] Isaac has not challenged the constitutionality of his jury instructions because *Robinson* holds such instructions were improper as a matter of state law. Nor has Isaac challenged the constitutionality of the statute under which he was convicted. Thus, the lengthy discussion of Parts V and VI of the plurality opinion is dicta.

sustain such a defense." Assuming Judge Lively's interpretation of *Robinson* is correct, Issac was entitled to a jury charge that if the jury had a reasonable doubt as to whether he acted in self-defense he should be found not guilty. Or, to state it differently, this is the equivalent of charging that the burden is on the state to *prove* the absence of self-defense beyond a reasonable doubt. Additionally, Judge Lively's interpretation of *Robinson* has an untenable result; the burden of proof of the affirmative defense of self-defense is on neither the defendant nor the prosecution.

Judge Lively also argues that "the quantum of proof necessary to sustain the defense of self-defense is a state procedural rule" which the state need not follow. However, a change in the "quantum of proof necessary to sustain the defense of self-defense" affects the truth-finding process at a criminal trial." *Hankerson* holds that such a change must be retroactively applied.

Judge Kennedy's dissent asserts that the application of Ohio's contemporaneous objection rule bars federal review.[3] The decision in *Wainwright v. Sykes*, 433 U.S. 72 (1977) holds that a defendant's failure to object to error at trial will *not* bar federal review of his conviction if he had "cause" not to object and the alleged error is prejudicial. Isaac had "cause" not to object to the jury instructions at his trial. Isaac neither knew nor could have known that the jury instructions at his trial were improper under *Robinson*, decided two years after his trial. There is no better "cause" for Isaac's failure to object to jury instructions than that the jury instructions were proper at the time of his trial.

Judge Kennedy mistakenly argues that the decision in *Mullaney* was a predicate for Isaac to object to jury instructions at his trial. *Mullaney* decided the issue of the constitutionality of the definition of a substantive offense. Neither Isaac nor the defendant in *Robinson* challenge Ohio's definition of a sub-

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[3] "The question of when and how defaults in compliance with state procedural rules can preclude our consideration at a federal question is itself a federal question." *Henry v. Mississippi*, 379 US 443, 447 (1965).

stantive offense. Isaac, as well as the defendant in *Robinson* argue only that their jury instructions were inconsistent with a state law, ORC Section 2901.05(A).

Lively, Circuit Judge, dissenting.

I respectfully dissent. Judge Brown's opinion recognizes that a state may place the burden of proving an affirmative defense upon a defendant so long as it does not require the defendant to prove an essential element of the crime. This is the holding of *Patterson v. New York*, 432 U.S. 197 (1977). However, the opinion of Judge Brown appears to treat O.R.C. Section 2901.05(A),[1] in which the legislature reduced the burden on a criminal defendant relying upon the affirmative defense of self-defense, as the equivalent of making the absence of self-defense an element of the crime of felonious assault. Thus the opinion holds that the State of Ohio violated Isaac's due process rights by permitting his conviction under instructions which placed upon him the burden of proving by a preponderance of the evidence matters as to which it had, by statute, assumed the burden of proof.

In *State v. Robinson*, 47 Ohio St. 103 (1976), the Ohio Supreme Court construed O.R.C. Section 2901.05(A) and specifically declined to consider constitutional arguments based on *Mullaney v. Wilbur*, 421 U.S. 684 (1975). The syllabus in *Robinson*, which contains the holding of the court under Ohio practice, states:

> In a criminal case involving the affirmative defense of self-defense, the defendant has only the burden of going forward with evidence of a nature and quality sufficient to raise that defense, and does not have the burden of establishing such defense by a preponderance of the evidence. (R.C. 2901.05[A] construed.)

I do not read O.R.C. Section 2901.05(A) and the *Robinson* holding as placing on the state a burden which is the equivalent of its burden of proving beyond a reasonable doubt each element of a charged offense. The statute and decision merely reflect the state's determination that a verdict of not guilty by

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[1] Ohio Revised Code Section 2901.05(A), effective January 1, 1974, provided:

> (A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused.

reason of self-defense may be based on "evidence of a nature and quality sufficient to raise that defense." *Robinson, supra.* They eliminate the former requirement that self-defense be established by a preponderance of the evidence. In reducing the quantum of proof required to permit an acquittal on grounds of self-defense, the state did not make a determination that absence of the facts necessary to sustain a plea of self-defense "must be either proved or presumed." *Patterson, supra,* 432 U.S. at 215.

I base this interpretation of Ohio's action upon my understanding of the nature of the defense of self-defense. In *Patterson,* supra, the Supreme Court recognized that there is a type of affirmative defense which does not seek to negative any facts which the state is required to prove in order to convict; that is, it does not put into issue any of the elements of the offense. Instead, such an affirmative defense constitutes "a separate issue." 432 U.S. at 207. This is clearly true of self-defense under Ohio law.

In *State v. Poole,* 33 Ohio St. 2d 18 (1973), the Ohio court recognized that all affirmative defenses to criminal charges are not the same. Some, such as accident or alibi, deny the existence of one or more elements of an offense. Affirmative defenses such as these put in issue an element of the charge and have no effect on the burden of proof. The burden is on the state to prove every element of an offense beyond a reasonable doubt whether the issue is joined by a plea of not guilty or by reliance on an affirmative defense of the type which controverts the existence of a particular element. To require a defendant to prove an affirmative defense of this type would be a violation of due process.

In *Poole* the Supreme Court of Ohio also defined self-defense under Ohio law. It stated that the defense of self-defense admits the existence of the elements of an offense but claims an independent ground for escaping conviction. It is in the nature of a civil plea of confession and avoidance—it admits the facts claimed by the prosecution to establish an offense but relies on the existence of a separate set of facts or circumstances which the law recognizes as an excuse. When established, this excuse exempts the defendant from liability. As the Supreme Court in *Patterson* recognized, it does not

violate due process to require the defendant to prove the existence of these facts or circumstances by a preponderance of the evidence. The jury does not reach a defense of self-defense until it finds that all elements of an offense have been established beyond a reasonable doubt. Thus there is no impermissible shifting of the state's burden.

Hankerson v. North Carolina, 432 U.S. 233 (1977), does not require us to reverse the district court. In *Hankerson* the state court construed the plea of self-defense as putting in issue an element of the offense of murder—the element of unlawfulness. For a trial court to require a defendant to prove self-defense, thus defined, by a preponderance of the evidence, was clearly a violation of the rule laid down in *Mullaney v. Wilbur*. Since the Ohio Supreme Court has defined self-defense is just the opposite way in *Poole*—as not controverting an element of the charge—*Hankerson* does not control this Ohio habeas case. The jury charge at Isaac's trial did not shift the burden of proof as to any element of the offense, and thus did not violate the *Winship-Mullaney* rule. All that occurred was that a state court failed to follow a state procedural statute as it was subsequently construed by the state supreme court. No constitutional error occurred at Isaac's trial, in my opinion.

Nor do I perceive a constitutional violation in the Ohio Supreme Court's decision to limit the benefit of a retroactive application of its construction of the Ohio statute to those persons who objected to an erroneous instruction at trial. Though the Ohio court interpreted O.R.C. Section 2901.05(A) in such a way as to make the instruction at Isaac's trial on the burden of proving the affirmative defense erroneous, the Constitution of the United States did not require such a construction. I believe it was within the authority of the court which construed the statute to determine the extent of its retroactive application.[2] The state did not violate Isaac's due process rights by requiring

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[2]In *Linkletter v. Walker*, 381 U.S. 618 (1965), the Supreme Court held that the decision whether to apply a new *constitutional* holding retroactively is largely one of policy. If this is so with respect to constitutional holdings, it cannot be argued that a stricter standard applies where a state court issues a new statutory interpretation.

him to abide by a longstanding state rule of practice in order to obtain appellate review. Shortly before the Ohio Supreme Court determined in *State v. Humphries*, 51 Ohio St. 95 (1977), to limit retroactive application of its *Robinson* decision to those defendants who had objected to an erroneous instruction, the Supreme Court appeared to invite such treatment by state courts in dealing with constitutional errors.[3] If a state has this option in dealing with a constitutional requirement, surely it is not a violation of due process to so limit retroactive benefit of a decision which merely construes a state procedural statute.

The Supreme Court reminded us in *Patterson* of considerations which should guide federal courts in deciding habeas corpus cases involving the administration by states of their own criminal justice systems:

> It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, *Irvine v. California*, 347 U.S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Speiser v. Randall*, 357 U.S. 513, 523 (1958); *Leland v. Oregon*, 343 U.S. 790, 798 (1952); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

432 U.S. at 201-02.

I would affirm the judgment of the district court.

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[3]*Humphries* was decided on July 20, 1977. The opinion in *Hankerson v. North Carolina*, issued June 17, 1977, contained the following footnote:

> [6]Moreover, we are not persuaded that the impact on the administration of justice in those States that utilize the sort of burden-shifting presumptions involved in this case will be as devastating as respondent asserts. If the validity of such burden-shifting presumptions were as well settled in the States that have them as respondent asserts, then it is unlikely that prior to *Mullaney* many defense lawyers made appropriate objections to jury instructions incorporating those presumptions. Petitioner made none here. The North Carolina Supreme Court passed on the validity of the instructions anyway. The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error. *See, e.g.*, Fed. Rule Crim. Proc. 30.

Merritt, Circuit Judge, dissenting. On the merits of this case, I believe that the Constitution prohibits a state from eliminating the justification of self-defense from its criminal law and requires the state to prove as an element of the crimes of assault and homicide that no such self-defense justification exists. But I also believe that Judge Kennedy's analysis of *Wainwright v. Sykes*, 433 U.S. 72 (1977) and footnote 8 in *Hankerson v. North Carolina*, 432 U.S. 233, 244 (1977) is correct and requires us to affirm the District Court without reaching the merits.

Kennedy, Circuit Judge, dissenting. Were I to reach the merits of petitioner's constitutional claim, I would concur with Judge Lively. However, I would affirm the District Court's denial of the writ of habeas corpus without reaching the merits, since I agree with the District Court that petitioner's claim does not fall within the "cause" and "prejudice" exception to the rule in *Wainwright v. Sykes*, 433 U.S. 72 (1977).

Petitioner objects to Ohio's failure to apply retroactively its determination that Ohio law removed from defendant the burden of proving self-defense by a preponderance of the evidence or, as the majority holds, its determination that Ohio law made the absence of self-defense an element of the crime of murder.

In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *In re Winship*, 397 U.S. 358 (1970), the Supreme Court held that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the state's definition of the offense with which the defendant is charged. *Hankerson v. North Carolina*, 432 U.S. 233 (1977), held that the rule established in *Mullaney* and *Winship* was to be applied retroactively.

Petitioner did not object to the erroneous jury instruction during his trial, and thus ran afoul of Ohio's contemporaneous objection rule. In *Wainwright*, the Supreme Court held that where failure to comply with a state's contemporaneous objection requirement precludes direct review of a constitutional issue, it likewise precludes federal habeas corpus review, absent a showing that defendant had "cause" not to object and that "prejudice" resulted from his not objecting. This failure to comply with the state's contemporaneous objection rule amounts to an independent and adequate state procedural ground for affirming the conviction with regard to that issue. *Wainwright, supra*, 433 U.S. at 81-82, 86-87. The majority in this case finds that petitioner had cause for the failure to object to the violation of *Mullaney* because *Mullaney* was unanticipated at the time of petitioner's trial.

The cause and prejudice exception to the *Wainwright* rule is not well-defined; in fact, there is little to guide the Court in its interpretation. *See Rachel v. Bordenkircher*, 590 F. 2d 200,

204 (6th Cir. 1978). However, when the Supreme Court in *Hankerson* made *Mullaney* retroactive, it observed that the resulting impact on the administration of justice would not be burdensome. The Court reasoned that if the validity of the burden-shifting instructions in cases of this type had been well settled, it would be unlikely that many defense lawyers would have made appropriate objections to those instructions. The Court then declared that

> The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error.

Hankerson, 432 U.S. at 244 n. 8.

I believe, as the Fourth Circuit recently decided, that this language in *Hankerson* was intended to protect states whose rule might have violated *Mullaney* from a flood of new trials. *See Cole v. Stevenson*, No. 78-6211 (4th Cir., May 5, 1980) (en banc). If, as this Court holds, a change in interpretation of the law provides "cause" for a defendant's failure to object at trial sufficient to satisfy the cause and prejudice exception of *Wainwright*, then the impact on the administration of justice of making that interpretation retroactive can never be mitigated by application of the states' contemporaneous objection rules. I do not believe that the suggestion in *Hankerson* to the contrary can be so freely ignored.

Further, the trial in this case was held three months after *Mullaney* was decided, and more than five years after *In re Winship*. Although it may have been difficult to anticipate when the Ohio courts would recognize that their procedure may violate *Mullaney* and *Winship*, or the exact manner in which the rule of those cases would be applied, the rule itself was not new or unanticipated.

It is clear that Ohio applied its contemporaneous objection rule in this case. It is also clear that Ohio intends to apply the contemporaneous objection rule generally in burden of proof cases. *State v. Long*, 53 Ohio St. 2d 91, 372 N.E.2d 804 (1978). Thus, I would hold that petitioner does not fall within the cause and prejudice exception of *Wainwright*, and that federal habeas corpus review on this issue is precluded.

NO. 78-3488

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LINCOLN ISAAC,
Petitioner-Appellant,
vs.
TED ENGLE, Superintendent,
Respondent-Appellee

[FILED DEC. 18, 1980]

O R D E R

The opinion of the Court in the above-captioned cause, decided and filed December 12, 1980, shall be modified as follows:

In the first line listing the members of the en banc Court, "Engle" should read "Engel";

The dissenting opinion of Judge Lively, beginning on page 17 of the slip opinion, is joined in by Judge Engel.

IT IS SO ORDERED.

ENTERED BY ORDER OF THE COURT

Signed by
John P. Hehman, Clerk

No. 78-3488

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LINCOLN ISAAC,
Petitioner-Appellant,
vs.
TED ENGLE, Superindendent Chillicothe Correctional Institute
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Ohio, Eastern Division.

[DECIDED AND FILE FEB. 8, 1980]

Before: Celebreeze, Circuit Judge, and Phillips and Peck, Senior Circuit Judges.

Peck, Senior Circuit Judge, delivered the opinion of the Court, in which Phillips, Senior Circuit Judge, joined. Celebrezze, Circuit Judge, (pp.11-13) filed a separate concurring opinion.

Peck, Senior Circuit Judge. The principal issue in this appeal is whether the Due Process Clause limits the selective denial of retroactive benefits of a new statutory interpretation, where denial is based upon failure to comply with a State's contemporaneous objection rule.

In 1975, petitioner Lincoln Isaac was convicted by an Ohio jury of one count of aggravated assault. At his trial, appellant relied on Ohio's affirmative defense of self-defense. The trial court instructed the jury that defendant bore the burden of proving his affirmative defense by a preponderance of the evidence.[1] This charge accorded with the prevailing law in Ohio, and petitioner made no objection. Subsequently, the Supreme Court of Ohio held that the Ohio legislature had changed the burden of proof for all affirmative defenses in Ohio, including self-defense. Interpreting Ohio Revised Code Section 2901.05 (A),[2] enacted in 1974 (but amended in 1978; see p. 9 infra), the court held that when a defendant pleads the affirmative defense of self-defense, he has only the burden of

going forward with evidence sufficient to raise the defense, and does not have the burden of establishing the defense by a preponderance of the evidence. *State v. Robinson*, 47 Ohio St. 2d 103 (1976).

In the Ohio court of appeals, petitioner argued that the trial court's jury instruction was erroneous, citing *Robinson*. That court of appeals affirmed Isaac's conviction, holding that his failure to object at trial waived any error in the jury instructions. An appeal to the Ohio Supreme Court was dismissed *sua sponte* for want of a substantial constitutional question. *State v. Isaac*, No. 77-412 (Ohio Sup. Ct., July 20, 1977). On the same day that petitioner's appeal was dismissed, however, the Ohio Supreme Court, in another case, held its *Robinson* decision to be applicable retroactively to all criminal trials held after the effective date of the statute. *State v. Humphries*, 51 Ohio St. 2d 95 (1977). However, despite that holding, the Court refused to extend the benefits of retroactivity to Humphries because of his failure to object to the erroneous jury charge at trial. *Id.* at 102.

After exhausting his state court remedies, Isaac turned to the federal courts for relief, filing a petition for a writ of habeas corpus, asserting that he was entitled to the retroactive application of *State v. Robinson, supra*, as a matter of federal constitutional law. The district court dismissed the petition on the grounds that appellant had shown neither cause for his failure to object to the jury instructions nor prejudice as a result of the faulty charge. This appeal followed.

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[1]The trial judge instructed the jury as follows:

> The burden of proving the defense of self-defense is upon the defendant. He must establish such defense by a preponderance of the evidence. Now a preponderance of the evidence is the greater weight of the evidence, that is, evidence that you believe because it outweighs or overbalances in your mind the evidence that is opposed to it . . . If the weight of the evidence is equally balanced or if you are unable to determine which side of an issue has the preponderance, then the defendant has not established such issue of self-defense. (Transcript at 227-228.)

[2]"Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused." Ohio Rev. Code. Section 2901.05(A).

As a preliminary matter, we note that the Constitution does not ordinarily require the retroactive application of a new interpretation of a statute. *See, e.g., Halliday v. United States*, 394 U.S. 831 (1969). On the other hand, where the statute pertains to an affirmative defense and the statute is construed to make the absence of the affirmative defense an element of proof of the crime itself a different result is mandated. In such a case, the constitutional doctrine announced in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and in *In re Winship*, 397 U.S. 358 (1970), requiring the prosecution to prove every element of a crime beyond a reasonable doubt, has application. *Berrier v. Egeler*, 583 F. 2d 515 (6th Cir.), *cert. denied*, 439 U.S. 955 (1978), and the Due Process Clause requires that the new interpretation be applied retroactively. *Hankerson v. North Carolina*, 432 U.S. 233 (1977). In *State v. Humphries, supra*, the Ohio Supreme Court decided to apply *State v. Robinson, supra*, retroactively as a matter of state law.[3] Accordingly, we need not grapple with the question of whether Ohio was obligated to do so as a matter of due process.

In our view, the single issue in this appeal is whether the decision of the Supreme Court of Ohio to withhold from petitioner the benefits of Section 2901.05(A), as established in *State v. Robinson*, for failure to comply with Ohio's contemporaneous objection rule was a deprivation of due process.

The decision to apply a new rule retroactively or prospectively is essentially one of policy, and is thus a determination to be made by appropriate state action. Once the determination to give retroactive effect to a new rule has been made, however, the benefits of the right conferred may not be withheld arbitrarily. *See generally, American Ry. Express Co. v. Kentucky*, 273 U.S. 269 (1931); *City of Cincinnati v. Vester*, 33 F. 2d 242 (6th Cir.), *aff'd*, 281 U.S. 439 (1930).

Respondent insists that the criterion used by the Ohio

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[3]Paragraph four of the syllabus in *State v. Humphries* read: "The General Assembly enacted R.C. 2901.05 to be effective January 1, 1974. Every criminal trial held on and after that date is required to be conducted in accordance with the provisions of that section."

Supreme Court in *State v. Humphries, supra*, 51 Ohio St. 2d 95, at 102, to limit the application of *State v. Robinson* was approved by the Supreme Court of the United States in *Hankerson v. North Carolina, supra*. In *Hankerson*, the Supreme Court of North Carolina held that a jury instruction that imposed the burden of proving self-defense upon the defendant was violative of due process under the Supreme Court's decision in *Mullaney v. Wilbur*, 421 U.S. 684 (1974). *Hankerson* was tried before the date on which *Mullaney* was decided. Concluding that it was not required to apply *Mullaney v. Wilbur* retroactively to a conviction that occurred before the date on which the Supreme Court's decision was handed down, the North Carolina court affirmed Hankerson's conviction. The Supreme Court reversed. It held that where a new constitutional rule is designed " 'to overcome an aspect of a criminal trial that *substantially* impairs its truth-finding function,' " the rule must be applied retroactively. 432 U.S. at 243, *quoting Ivan V. v. City of New York*, 407 U.S. 203, 204 (1972).

The language in *Hankerson, supra*, relied on by respondent in the case at bar, came in partial response to the state's contention that retroactivity would have a devastating effect on the administration of justice. To this argument, the Court replied in a footnote that a State "may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error. *See, e.g.*, Fed. Rule Crim. Pro 30." 432 U.S. at 244 n. 8. Ohio has a similar rule.[4]

The footnote cited by respondent was *dictum*. The petitioner in *Hankerson*, like the appellant here, failed to object to the jury instructions at trial. The North Carolina Supreme Court chose to pass on the validity of the instructions, nevertheless. Thus, the question of whether a state may constitutionally utilize its procedureal rules to bar the application of a retroactive ruling was not before the Court.

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[4]Rule 30, Ohio Rules of Criminal Procedure, expressly provides that, "[a] party may not assign as error the giving or the failure to give any instructions unless he objects thereto before the jury retires to consider its verdict . . . stating specifically the matter to which he objects and the grounds of his objection." *See also State v. Glaros*, 170 Ohio St. 471 (1960).

This Court, of course, is not controlled by *dicta*. Moreover, we need not pass on the question of whether, as a general rule, defendants may be required to raise their objections to jury instructions at trial. We are confronted here with a specific factual situation in which we are required to decide whether the state court's decision in the instant case was arbitrary or capricious. Thus, the test to be applied on this appeal is whether the means selected by the Ohio Supreme Court in *Humphries, supra*, bear a real and substantial relation to the ends sought to be attained by the use of its procedural rule to deny the benefits of retroactivity to the petitioner. Therefore, we turn to the justification for Ohio's procedural rule that requires a defendant to challenge jury instructions at trial or not at all.

In *State v. Williams*, 51 Ohio St. 2d 112 (1977), *vacated in part sub nom. Williams v. Ohio*, 439 U.S. 955 (1978), handed down on the same day that petitioner's appeal was dismissed, the Supreme Court of Ohio, in paragraph one of the syllabus,[5] said:

> An appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.

In the text of the *Williams* opinion, the court went on to say:

> Any other rule would relieve counsel from any duty or responsibility to the court and place the entire responsibility upon the trial court to give faultless instructions upon every possible feature of the case, thereby disregarding entirely the true relation of court and counsel which enjoins upon counsel the duty to exercise diligence and to aid the court rather than by silence mislead the court into commission of error. [citation omitted] *Id.* at 117.

Thus, it is clear that the end which the contemporaneous objection rule seeks to achieve is to make trial proceedings as

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[5]Under Ohio Law, only the points of law set out in the syllabus are considered to have the force of law, unless the opinion is per curiam. The statements made in the body of the opinion are the conclusions of the judge writing the opinion. *See, e.g., Haas v. State*, 103 Ohio St. 1 (1921).

error free as possible. *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). The rule does not assume that a trial court will always avoid or correct the error asserted; if it did, appellate courts would not be needed. But, as *State v. Williams, supra*, suggests, the rule does assume that some basis for the assertion of error exists, however tenuous, that can be discovered through due diligence of counsel and presented in good faith to the trial court for its consideration. Stated another way, the contemporaneous objection rule presupposes the contemporaneous existence of some legal principle that is applicable to the proceedings at trial.

In the present case, the principle that the defendant must bear the burden of proving the affirmative defense of self-defense was well-settled in Ohio prior to the enactment of Ohio Revised Code Section 2901.05(A). *See, e.g., Silvus v. The State*, 22 Ohio St. 90 (1871); *see also, State v. Seliskar*, 35 Ohio St. 2d 94 (1973), and cases cited therein. At the time of appellant's trial, no Ohio court had held or even indicated that the statute had modified the common law. The committee notes that accompanied the new statute reflected no alteration in existing law. Nor was the statute accompanied by a transition table, sometimes used to explain the effect of a new statute on prior law, including the date the new law is to be phased in and the old phased out. *See, e.g.*, Ohio Rev. Code Ann. Sections 2903.01 and 2929.04 (Page 1975). The standard Ohio Jury Instructions, which placed the burden of proving the affirmative defense of self-defense by a preponderance of the evidence on the defendant, remained unchanged after the enactment of Section 2901.05(A). *4 O.J.I. Criminal* 409.60 (1970 ed.). Further, the leading treatises perceived no variation from prior law. 1 *Anderson's Ohio Criminal Practice and Procedure* Section 52.15 (1975 ed.); 1 O. Schrader and L. Katz, *Ohio Criminal Law Practice*, Tit. 29 at 14 (1974 ed.). Finally, the Ohio Supreme Court gave credence to the view that Section 2901.05 (A) had not altered the common law when, in *State v. Rogers*, 43 Ohio St. 2d 28 (1975), *cert. denied*, 423 U.S. 1061 (1976), it said: "[S]elf defense is an affirmative defense, which must be established by a preponderance of the evidence (*State v. Seliskar* [1973], 35 Ohio St. 2d 95, 96). . . ." *Id.* at 30. With respect to Section 2901.05, the Court further stated: "The defense of using reasonable force to effect a citizen arrest . . . is . . . an affirmative defense (R.C.

2901.05[C] [2]) which places the burden of going forward with the evidence upon the accused R.C. 2901.05[A] to prove that issue by a preponderance of the evidence. *See State v. Seliskar, supra,* (35 Ohio St. 2d 95)." Id. at 33.

The language quoted from *Rogers* was *dictim.* Therefore, at the time of petitioner's trial, the question of who must bear the burden of proving the affirmative defense of self-defense had not been definitively answered. Nevertheless, we believe the decision to apply *State v. Robinson, supra,* retroactively is strong evidence that the Ohio Supreme Court recognized that its *Robinson* decision had changed the law substantially.

We hold that in these circumstances, the failure to object at trial cannot bar the petitioner from the retroactive application of *State v. Robinson, supra.*

As previously stated, the contemporaneous objection rule presupposes the existence of a legal principle capable of being advanced to support an objection. Yet, in the case at bar, every recognized authority on affirmative defenses in Ohio as well as *dictum* from the Ohio Supreme Court reinforced the propriety of the trial court's charge to the jury. Thus, existing law provided no basis for an objection to the court's jury instructions at the time of trial. To require an objection in these circumstances would be to require the doing of a vain act. We are, therefore, led to the conclusion that there was no real or substantial relation between the use of the contemporaneous objection rule as a bar to retroactivity in the instant case and the rule's avowed purpose. In *O'Connor v. Ohio,* 385 U.S. 92 (1966), the Supreme Court held that the failure to object at trial to a practice that Ohio had long allowed could not deprive the petitioner of his right to attack that practice in the state courts following its subsequent invalidation by the Supreme Court. The Court reasoned that defendants cannot be charged with anticipating future decisions invalidating past practices. Though *O'Connor* involved the attempted assertion of a federal claim, we believe the logic of that decision to be equally persuasive in the context of the present case.

The district court's reliance on *Wainwright v. Sykes,* 433 U.S. 72 (1977), to dismiss appellant's petition was misplaced. Insofar as petitioner claims that he was entitled to attack

collaterally the constitutionality of the jury instructions on the basis of *Mullaney v. Wilbur, supra,* 421 U.S. 684, despite his failure to preserve properly the issue at his state trial, *Wainwright v. Sykes* provides the initial test for federal habeas review. Absent a showing of cause for the noncompliance with Ohio's contemporaneous objection rule and some showing of actual prejudice, federal habeas corpus review of his *Mullaney* claim is barred. *See, e.g., Berrier v. Egeler,* 583 F. 2d 515 (6th Cir.), *cert. denied,* 439 U.S. 955 (1978). It was proper for the district court to apply the cause and prejudice test to this branch of petitioner's claim, though we express no opinion as to the soundness of its conclusion. Having applied the test, however, the court's task was only half finished.

The major thrust of petitioner's claim was, and is, not directed to the constitutionality of the jury instruction itself; but rather, it centers upon and challenges the constitutionality of the Ohio Supreme Court's selective application of its *State v. Robinson* decision while petitioner's conviction was still pending on review in the state courts. *Wainwright v. Sykes, supra,* is not applicable to this second prong of appellant's petition.

Since we find petitioner's selective retroactivity claim to be meritorious, we do not deem it necessary to address appellant's further assertion that the jury instructions at his trial were unconstitutional. Consequently, it is also unnecessary to pass upon the question of whether Isaac established cause and prejudice as a predicate to habeas review of that latter claim.

In our disposition of this case we are not unmindful of the amendment by the Ohio General Assembly of Ohio R.C. Section 2901.05(A), effective November 1, 1978. That section again requires affirmative defenses to be established by a preponderance of the evidence. If this section were to have application in any retrial which might result from our holding, that conclusion might be considered senseless since on retrial the pertinent jury instruction would be identical to that given at the original trial. However, it is apparent that any such retrial would not fall under the purview of amended section 2901.05(A) because such procedure would clearly be impermissible on *ex post facto* grounds. U.S. Const., art. I, Section 10, cl. 1. *See United States v. Williams,* 475 F. 2d 355 (D.C. Cir. 1973), and cases

therein cited.[6] This circumstances would require, in our view, an instruction to the jury that the raising of the affirmative defense of self-defense does not relieve the state of its obligation of proving every element of the offense beyond a reasonable doubt and that the defendant does not bear the burden of proving such defense by a preponderance of the evidence.

The judgment of the district court is reversed and the case is remanded with directions to grant a writ of habeas corpus to the petitioner unless the State of Ohio shall grant him a new trial within a reasonable time to be fixed by the district court.

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[6] "Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender [is *ex post facto*]." *Calder v. Bull*, 3 U.S. 305, 309, 3 Dall. 386, 390 (1798). "Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount of degree, than was required when the offense was committed, ought, in respect of that offense, to be obnoxious to the constitutional inhibition upon *ex post facto* laws." *Mallett v. North Carolina*, 181 U.S. 589, 595 (1900), *quoting Hopt. v. Utah*, 110 U.S. 574 (1884); *see also Landay v. United States*, 108 F. 2d 698, 705 (6th Cir. 1939). "[T]he legislature may not, under the guise of establishing modes of procedure . . . violate the accepted principles that protect an accused person against *ex post facto* enactments." 181 U.S. at 596. *See also Malloy v. South Carolina*, 237 U.S. 180 (1915); *Duncan v. Missouri*, 152 U.S. 377 (1894); *Hopt v. Utah*, 110 U.S. 574 (1884); *Kring v. Missouri*, 107 U.S. (7 Otto) 221 (1883); *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1867); *Frisby v. United States*, 38 App. D.C. 22 (1912). *See also, generally*, Croseky, The True Meaning of the Constitutional Provision of Ex Post Facto Laws, 14 U.Chi.L.Rev. 539 (1947).

Celebrezze, J., concurring.

The primary focus in this case is whether Ohio may, consistent with due process, utilize its contemporaneous objection rule to bar retroactive effect to its *Robinson* decision. Having concluded in *State v. Humphries*, 51 Ohio St. 2d 95 (1977), that *Robinson* should apply retrospectively, Ohio now attempts to deny Isaac the benefits of the retroactive application of *Robinson* because his counsel failed to object at trial to the jury instructions on the issue of self-defense.

In analyzing Ohio's failure to accord Isaac the retroactive benefit of *Robinson*, the majority employs a standard of review which seeks to discover some rational relationship between the purposes that Ohio's contemporaneous objection rule is designed to serve and the reason for which that rule was involked in this case. The majority concludes that the utilization of the contemporaneous objection rule to bar retroactive application of *Robinson* is an arbitrary exercise of state procedural law which constitutes a deprivation of due process. This is so, the majority reasons, because the contemporaneous objection rule presupposes the existence of a palpable objection, and here Isaac's counsel had no valid reason to object to the trial judge's instructions on the issue of self-defense. To the contrary, however, an objection based on the constitutional infirmity subsequently isolated in *Mullaney v. Wilbur*, 421 U.S. 684 (1975) was always available; that is, Isaac could have objected that the instructions placed upon him the burden of proof in violation of the principles of due process expressed in *In re Winship*, 397 U.S. 358, 364 (1970).

I write separately because I believe that such speculation as to whether Isaac's counsel could or should have raised an objection at trial is too hypothetical a predicate for federal interdiction of a state procedural rule. It is an equally uncertain ground for denying Isaac a new trial in which the burden of proof as defined by *Robinson* applies. Admittedly, federal interference with Ohio's contemporaneous objection rule should proceed cautiously in light of the Supreme Court's deference to the application of state procedural rules. *See e.g. Wainwright v. Sykes*, 433 U.S. 72 (1977). This deference takes on an added dimension in light of Justice White's observation in *Hankerson*

v. North Carolina, 432 U.S. 233, 244 n. 8 (1977), that a state might be able to use its procedural rules to insulate past convictions from collateral attack.[1] From a legal technician's viewpoint, this dicta offers a viable avenue for avoiding the full impact of *Mullaney*.

Although i believe that, despite *Mullaney v. Wilbur*, it is constitutionally permissible for a state to treat self-defense as an affirmative defense that the prosecution need not negate beyond a reasonable doubt, *see Patterson v. New York*, 433 U.S. 197, 210 (1977); *Berrier v. Egeler*, 583 F. 2d 515, 524 (6th Cir. 1978) (Engel, J., dissenting), *cert. denied*, 439 U.S. 955; *cf. Hankerson v. North Carolina*, 432 U.S. 233, 245 (whether due process requires the prosecution to disprove self-defense beyond a reasonable doubt under North Carolina law left undecided), the Ohio Supreme Court has interpreted O.R.C. Section 2901.05(A) so as to place upon the defendant only the burden of going forward with evidence sufficient to raise the defense. *State v. Robinson*, 47 Ohio St. 2d 103 (1976).

As expressed by a unanimous Court in *Hankerson*, the definition and placement of the burden of proof is a fundamental aspect of the truth-finding process of a criminal trial. *Hankerson, supra* at 243-44. *See also Winship* at 370-72 (Harlan, J., concurring); *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958); *see generally, Jefferies & Stephen, Defenses, Presumptions and Burden of Proof in the Criminal Law*, 88 Yale L.J. 325 (1979). Protecting that truth-finding function must take precedence over a state's procedural concerns expressed in an contemporaneous objection rule. As such, denying to a defendant a trial under what the Ohio Supreme Court has concluded to be the proper allocation of the burden of proof amounts to a denial of due process of law.

Redefining the burden of proof placed upon a defendant, whether it be by a new constitutional rule or by a new statutory

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[1]Were the challenge here directed to the substance of the jury instructions, use of a contemporaneous objection rule to preclude habeas corpus review might be justified. *See Frazier v. Weatherholtz*, 572 F.2d 992, 997-98 (4th Cir. 1978). *See also United States v. Jackson*, 569 F.2d 1003, 1008-09 (7th Cir. 1978).

interpretation of constitutional dimension, has a substantial impact upon a criminal trial's truth-finding function. In such situations retroactive application is imperative. *Hankerson, supra,* at 241 quoting *Ivan V. v. City of New York,* 407 U.S. 203, 204-05 (1972).

Since the Ohio Supreme Court's decision in *Robinson* significantly effects the burden of proof to be placed upon a defendant, due process requires that Isaac receive the benefits of that court's interpretation. Accordingly, I concur in the judgment of the court awarding the writ.

No. 78-3488

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LINCOLN ISAAC,
Petitioner-Appellant,

vs.

TED ENGLE, SUPERINTENDENT,
CHILLICOTHE CORRECTIONAL INSTITUTE,
Respondent-Appellee

ORDER
[FILED MAR. 24, 1980]

A majority of the Judges of this Court in regular active service have voted for rehearing of this case en banc. Sixth Circuit Rule 14 provides as follows:

> The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this Court, to stay the mandate and to restore the case on the docket pending appeal.

Accordingly, it is ORDERED that the previous decision and judgment of this Court is vacated, the mandate is stayed and this case is restored to the docket as a pending appeal.

The Clerk will direct the parties to file supplemental briefs and the case will be scheduled for oral argument during the June, 1980 session.

ENTERED BY ORDER OF THE COURT

Signed By
John P. Hehman, Clerk

No. 78-3488

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[FILED DEC. 31, 1980]

LINCOLN ISSAC,
Petitioner-Appellant,

vs.

TED ENGLE, SUPERINTENDENT,
CHILLICOTHE CORRECTIONAL INSTITUTE,
Respondent-Appellee

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

Signed by
John P. Hehman, Clerk

No. C-2-78-278

UNITED STATES DISTRICT COURT
FOR
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[FILED JUN. 26, 1978]

LINCOLN ISAAC
vs.
TED ENGLE SUPERINTENDENT

JUDGMENT

This action came on for consideration before the Court, The Honorable Robert M. Duncan United States District Judge, presiding. The issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED THAT: the petition is without merit, and it is DENIED. This action is hereby DISMISSED. Judgment is entered for the respondent.

Signed by

John D. Lyter, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action C-2-78-278

[FILED JUN. 26, 1978]

LINCOLN ISAAC,

Petitioner

vs.

TED ENGLE, Superintendent

Respondent

OPINION AND ORDER

Petitioner, a State prisoner, brings this action for a writ of habeas corpus under the provisions of Title 28, United States Code, Section 2241 (c) (3). This matter is before the Court on the petition, return of writ, and briefs and exhibits of the parties.

Petitioner was indicted by the April, 1975 Term of the Pickaway County, Ohio Grand Jury for felonious assault in violation of R.C. 2903.11. He was tried to a jury which returned a verdict of guilty of aggravated assault in violation of R.C. 2903.12. The trial court sentenced petitioner to a term of six (6) months to five (5) years imprisonment.

Petitioner alleges that he is in the custody of respondent in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that:

> The trial court charged petitioner had the burden of proving self-defense. After conviction and during the first appeal the Ohio Supreme Court declared the instructions to be prejudicial error under *Robinson*. This case was immediately raised to the Appellate Court. They held any error was waived. The Ohio Supreme Court then held *Robinson* retroactive. Petitioner had raised retroactivity in its leave to appeal and was denied leave to appeal the same day *Humphries* was declaring retroactivity. The Ohio Supreme Court refuses to give relief despite its own pronouncement. The holding of the Court is contrary to the Supreme Court of the United States in regard to proving self-defense.

In the Fourth Appellate District Court of Appeals for Pickaway County, Ohio petitioner raised the following relevant claim for relief:

> The Court committed prejudicial error by instructing the jury that the defendant had to prove the affirmative defense of self defense by a preponderance of the evidence.

The Court of Appeals rejected the assignments of error with the following ruling:

> In support of his argument Defendant-Appellant cites *State* v. *Robinson*, 47 O.S. 2d 103, . . . a recently decided Ohio Supreme Court case, eliminating the degree of proof referred to above. A review of the transcript reveals that in his opening statement and closing statement, Defendant's counsel stated to the jury that the burden of proof was by a "preponderance of the evidence." Further, Defendant-Appellant made no objection to that portion of the charge dealing with that burden of proof, as required for review under the terms of Ohio Rules of Criminal Procedure, Rule 30. The failure to make such an objection waives any error not called to the attention of the trial court. As noted by Plaintiff-Appellee, see also, *State* v. *Glaros*, 170 O.S. 471, *State* v. *Slone*, 45 O. App. 2d 24. The fifth assignment of error is not well taken and overruled; the verdict of the jury is affirmed.

Petitioner then filed a motion for leave to appeal to the Supreme Court of Ohio, alleging the following relevant errors:

> 3. A court instruction placing the burden of proof of self-defense on defendant is plain error under Criminal Rule 52(d) and a failure to object will bar raising the Court's instruction for the first time on appeal.
>
> 4. It is denial of the due process clause of the United States Constitution to place the burden of proof of self-defense on the defendant and failure to make a timely objection does not bar the defendant from asserting an error for the first time on appeal the Court's instruction placing the burden of proof upon him.

Respondent contends that petitioner has not exhausted his available State court remedies by fairly presenting his federal constitutional claim for relief to the appropriate State courts. 28 U.S.C. Section 2254 (b), (c). *Picard* v. *Connor*, 404 U.S. 270, 275-276 (1971). Petitioner did not raise his federal constitutional claim for relief in the trial court. On the present record, it

is unclear whether he raised a federal constitutional claim for relief in the Court of Appeals for Pickaway County, Ohio. The claim for relief presented to the Court of Appeals was based upon the Supreme Court of Ohio's decision in *State* v. *Robinson*, 47 Ohio St. 2d 103 (1976). *Robinson* did not decide the federal constitutional question of whether, under Ohio law, placing the burden of proving the affirmative defense of self-defense upon the defendant violates the defendant's due process right to have the State prove each essential element of the crime beyond a reasonable doubt. See, *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975); *Patterson* v. *New York*, 45 U.S.L.W., 4708, 4711-4713 (1977). The Court in *Robinson* held that as a matter of State law R.C. 2901.05(A) did not put the burden of proof of the affirmative defense of self-defense upon the defendant. Petitioner's brief in the Court of Appeals is not a part of the record in this Court, so the Court is unable to say whether petitioner fairly presented his federal due process claim to the Court of Appeals. The mere invocation of *Robinson* does not necessarily mean the federal claim was presented.

The Court need not determine whether petitioner has fairly presented his federal constitutional question to the appropriate State courts because the record clearly establishes that petitioner waived his constitutional claim by failing to present it to the trial court. *State* v. *Long*, 53 Ohio St. 2d 91, 95-97 (1978); *State* v. *Humphries*, 51 Ohio St. 2d at 103. The State court procedural waiver bars presentation of the federal constitutional claim in habeas corpus unless the petitioner makes a showing of cause and actual prejudice. *Francis* v. *Henderson*, 425 U.S. 536, 542 (1976); *Estelle* v. *Williams*, 425 U.S. 501, 512 (1976). Petitioner has not made a showing of either cause or actual prejudice. Accordingly, the Court HOLDS that he has waived his federal constitutional claim.

WHEREUPON, the Court FURTHER HOLDS that the petition is without merit, and it is DENIED. This action is hereby DISMISSED. The Clerk of Court shall enter JUDGMENT for respondent.

SIGNED BY
ROBERT M. DUNCAN, JUDGE
UNITED STATES DISTRICT COURT

No. 79-3153

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENNETH L. BELL,
Petitioner-Appellant,
v.
E.P. PERINI, Superintendent,
Marion Correctional Institute,
Respondent-Appellee.

On Appeal from the United States District Court for the Northern District of Ohio.

Decided and Filed December 12, 1980

Before: Merritt, Brown and Martin, Circuit Judges.

Bailey Brown, Circuit Judge, delivered the opinion of the Court in which Martin, Circuit Judge, joined. Merritt, Circuit Judge, (p. 7) filed a separate dissenting opinion.

Bailey Brown, Circuit Judge. The petitioner, Kenneth L. Bell, appeals from the district court's denial of his petition for a writ of habeas corpus. Bell contends that the jury instructions given at his state criminal trial in Ohio shifted to him, in violation of due process, the burden of disproving an element of the offense for which he was indicted. More specifically, Bell contends that at his murder trial he was denied due process because the jury was instructed that the burden was on him to prove self-defense by a preponderance of the evidence. In resolving this contention, we first must review the development of Ohio law in this area in the recent past.

I.

Prior to 1974, Ohio followed the traditional common law rule that the defendant in a criminal case not only had the burden of going forward with evidence in support of an affirmative defense but also had the burden of proving such affirmative defense by a preponderance of the evidence. *State* v. *Seliskar*, 35 Ohio St. 2d 95 (1973). As of January 1, 1974, however, a new statutory provision became effective. That provision, codified as Ohio Revised Code 2901.05(A), stated:

> (A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused.

Apparently, R.C. 2901.05(A) was not initially considered to effect any change in the previous common law rule. In fact, the Ohio Supreme Court, as late as 1975, reaffirmed at least in a dictum the principle that a defendant must bear the burden of proving affirmative defenses by a preponderance of the evidence[1] *State v. Rogers*, 43 Ohio St. 2d 28 (1975).

The petitioner in this case was indicted in 1975 for aggravated murder. At his trial, Bell testified that he had acted in self-defense. The trial court instructed the jury without objection by Bell that it was incumbent on Bell to demonstrate self-defense by a preponderance of the evidence. The jury found Bell guilty of murder. He was sentenced to a term of fifteen years to life imprisonment.

Bell appealed his conviction to the Cuyahoga County Court of Appeals. That appeal, however, did not question the validity of the jury instruction concerning self-defense. In April, 1976, the Court of Appeals affirmed Bell's conviction.

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[1] In *Rogers*, the Ohio Supreme Court in dictum stated:

> The defense of using reasonable force to effect a citizen arrest necessarily involves an allegation of excuse or justification, and is, therefore, an affirmative defense (R.C. 2901.05[C][2]) which places the burden of going forward with the evidence upon the accused (R.C. 2901.05[A]) to prove that issue by a preponderance of the evidence. See *State v. Seliskar, supra*, 35 Ohio St. 2d 95, 298 N.E. 2d 582.

In July, 1976, the Supreme Court of Ohio, in *State v. Robinson*, 47 Ohio St. 2d 103 (1976), held that R.C. 2901.05 (A) had substantially altered the previously accepted common law rule defining the burden of proof in criminal cases. The court construed R.C. 2901.05 (A) to require that a defendant go forward with sufficient evidence to raise the affirmative defense but that if the defendant presented such evidence, the prosecution then must demonstrate beyond a reasonable doubt the guilt of the defendant even to the extent of disproving such affirmative defense. Interpreting R.C. 2901.05 (A) in this manner, the Ohio Supreme Court held that any jury instruction placing the burden of proving an affirmative defense on the defendant constituted prejudicial error.

Nonetheless, Bell's conviction was subsequently affirmed by the Ohio Supreme Court when it dismissed Bell's appeal for lack of a substantial constitutional question. The question of the validity of the jury instructions was not presented to or considered by the court in rendering its decision.

In 1977, the Ohio Supreme Court determined as a matter of state law that *State v. Robinson, supra*, should be applied retroactively to all criminal cases tried subsequent to January 1, 1974. *State v. Humphries*, 51 Ohio St. 2d 95 (1977). In *Humphries*, however, the court also held that the failure to object to a jury instruction effectively waived any claim of error based on Robinson.[2]

In 1978, Bell filed a petition for a writ of habeas corpus in the proper federal court challenging the constitutional validity of the jury instructions.[3] The district court held that the jury instructions imposing on Bell the burden of proving self-defense were consistent with the Ohio law at the time of Bell's trial. It also concluded, relying on *Patterson v. New York*, 432 U.S. 197

[2]Effective November 1, 1978, R.C. 2901.05(A) was amended to adopt once again the common law rule that the defendant has the burden of proving affirmative defenses by a preponderance of the evidence.

[3]The district court determined that, since Bell has no available state remedy by which he could raise the issue presented here, he has exhausted his remedies. Respondent does not challenge this ruling.

(1977), that a state could constitutionally so impose the burden of proving self-defense on a defendant. The district court also held that Bell had no due process right to the retroactive application to his case of the decision in *Robinson*. Accordingly, the district court denied the petition, and Bell brought the instant appeal.

II.

The appeal in this court in Isaac v. Engle, F. 2d (6th Cir. 1980) raised essentially the same issue as is raised here. The habeas petitioner there, Lincoln Isaac, was convicted of felonious assault in Ohio in 1975 while Ohio Revised Code Section 2901.05(A) was in effect. At trial, Isaac had relied on a defense of self-defense, offering sufficient evidence to create such issue, and the trial court instructed the jury, without objection from Isaac, that the burden was on Isaac to prove self-defense by a preponderance of the evidence. Isaac, on appeal, relied on *State v. Robinson, supra*, in which the Supreme Court of Ohio had held that Section 2901.05 (A) had effectively placed the burden on the state, when the issue is effectively raised, of proving absence of self-defense beyond a reasonabale doubt. The Ohio Court of Appeals held that Isaac had waived his claim of error in the jury instruction by failing to object thereto, citing an Ohio procedural rule. The Ohio Supreme Court dismissed Isaac's appeal for lack of a substantial constitutional question. On the same day it dismissed Isaac's appeal, it decided in *State v. Humphries, supra*, that *Robinson* would be given retroactive effect but that, relying on the Ohio contemporaneous objection rule, held that failure to object to the charge to the jury would constitute a waiver.

Isaac sought habeas relief in federal district court, but such relief was denied on the ground that Isaac had not shown "cause" for his failure to object to the charge and "prejudice" as a result of such charge as is required by *Wainwright v. Sykes*, 433 U.S. 72 (1977).

On appeal, in an *en banc* decision,[4] a majority of this court

[4]The panel opinion in *Isaac v. Engle* is reported in F. 2d at

voted to reverse the district court and to grant relief to Isaac. The majority were of the opinion that Isaac had shown "cause," as is required by *Wainwright*, since, at the time of his trial, Isaac neither knew nor reasonably could have known that the charge to the jury with respect to burden of proof as to self-defense was contrary to Ohio law or that such charge constituted a denial of federal due process. The majority also held that Isaac had shown actual "prejudice" since Isaac had by his testimony made self-defense a live issue in his trial. The plurality opinion in *Isaac*, authored by the writer of this opinion, held that Isaac had been denied federal due process by placing on him, contrary to Ohio law, the burden of proving self-defense. The plurality opinion reached this result on the theory that, since Ohio had by statute assumed the burden of proving absence of self-defense, placing such burden on Isaac was, for practical purposes, the the equivalent of placing on Isaac the burden of proving the absence of an element of the crime of felonious assault. *See: In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); and *Patterson v. New York*, 432 U.S. 197 (1977). In opinions concurring in the result, Chief Judge Edwards and Judge Jones were of the opinion that, in view of the definition of felonious assault in the Ohio statute, absence of self-defense is an element of the crime that federal due process requires that the state prove.

III.

We believe that Bell, in the instant case, has likewise shown "cause" and "prejudice" as is required by *Wainwright* for the reasons stated in the plurality opinion in *Isaac*. We further believe that Bell was denied federal due process for the reasons stated in the plurality opinion in *Isaac*. Lastly, we believe that, for the reasons stated in the plurality opinion in *Isaac*, Bell is entitled to jury instructions that are consistent with Ohio law in 1975 as construed in *Robinson, supra*.

The judgment of the district court is reversed and the case is remanded. The district court is directed to order that petitioner be released from custody unless Ohio chooses to retry him within a reasonable time to be determined by the district court.

Merritt, Dissenting. I dissent from the opinion of the Court for the same reasons expressed in my dissenting opinion in *Isaac v. Engle*, F. 2d (6th Cir. 1980). The basic reason expressed there was that Ohio's contemporaneous objection rule provides an independent state ground for the state court's decision under *Wainwright v. Sykes*, 433 U.S. 72 (1977). That same reasoning applies to the instant case.

No. 79-3153

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[FILED DEC. 31, 1980]

KENNETH L. BELL,
Petitioner-Appellant,

vs.

E.P. PERINI, SUPERINTENDENT,
MARION CORRECTIONAL INSTITUTE,
Respondent-Appellee

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

Signed by
John P. Hehman, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO WESTERN DIVISION

Civil Action File No. C 78-343

[FILED DEC. 26, 1978]

KENNETH L. BELL
vs.
E.P. PERINI, Supt.

JUDGMENT

This action came for trial (hearing) before the Court, Honorable Nicholas J. Walinski, United States District Judge, presiding, and the issues have been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged petition dismissed.

Signed by
James S. Gallas

No. C 78-343

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN D!STRICT OF OHIO
WESTERN DIVISION

[FILED DEC. 26, 1978]

KENNETH L. BELL,

Petitioner,

vs.

E.P. PERINI, Supt.,

Respondent.

OPINION AND ORDER

WALINSKI, J:

This cause came to be heard on a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. Section 2254. Petitioner presently is incarcerated in respondent's custody at the Marion Correctional Facility, Marion, Ohio, where he is serving a sentence of fifteen years to life imposed by the Cuyahoga County Court of Common Pleas. Petitioner's sentence was imposed on April 18, 1975, pursuant to a jury determination that he was not guilty of Aggravated Murder, the indicted crime, but guilty of a lesser offense of Murder, a violation of Ohio Revised Code Section 2903.02. Petitioner appealed his conviction to the Cuyahoga County Court of Appeals where he urged five assignments of error. On April 8, 1975, the court overruled each of petitioner's claims and affirmed the conviction. An appeal to the Ohio Supreme Court was dismissed *sua sponte* in September, 1976, for want of a substantial constitutional question.

Petitioner then brought the instant action in habeas corpus. Petitioner claims, respondent acknowledges, and this Court so

finds that petitioner has exhausted his state remedies.[1] The sole question presented is whether the trial judge's instruction to the jury that petitioner must prove self-defense by a preponderance of the evidence was a violation of due process.

Petitioner does not now challenge the correctness of the instruction with respect to the elements of self-defense. Petitioner further admits that the charge reflected Ohio practice as it then existed concerning the burden of proof and which party must prove the elements of the defense.[2] *See State v. Sekiskar*, 35 Ohio St. 2d 95 (1973); *State v. Rogers*, 43 Ohio St. 2d 28 (1975), *cert. denied*, 423 U.S. 1061 (1976). *See generally* Comment, *Affirmative Defenses in Ohio After Mullaney v. Wilbur*, 36 Ohio St. L.J. 828 (1975). Relying principally on *Mullaney v. Wilbur*, 421 U.S. 684 (1975), petitioner claims, however, that Ohio practice was in conflict with the requirements of due process.[3]

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[1]It does not appear that petitioner has ever raised in the courts of Ohio the issue he now raises in this Court. Nonetheless, the Court is not aware of any presently available state remedy where petitioner could yet present to the state courts this issue. *See Riley v. Havener*, 391 F. Supp. 117 (N.D. Ohio 1974). Moreover, this Court construes respondent's silence with respect to the issue of "exhaustion" and respondent's argument on the merits (or more appropriately, his quoting three paragraphs from *Patterson v. New York*, 432 U.S. 197 (1977) as proof that petitioner's failure to raise the issue was not a "deliberate bypass." *Fay v. Noia*, 372 U.S. 341 (1963); *Wainwright v. Sykes*, 433 U.S. 72 (1977).

[2]Under Ohio Revised Code Section 2901.05(A):

> Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused.

Subsequent to petitioner's trial, this provision has been interpreted to remove from a defendant the burden of proving an affirmative defense. *See State v. Robinson*, 47 Ohio St. 2d 103 (1976); *State v. Chase*, 55 Ohio St. 2d 237 (1978); *State v. Abner*, 55 Ohio St. 2d 251 (1978).

[3]For reasons best known to respondent, the Court does not have a transcript of petitioner's trial. As such, the Court emphasizes that the issue decided in this Opinion is simply whether it was unconstitutional to place on petitioner the burden of proving self-defense by a preponderance of the evidence. Thus, this decision in no way affects a decision that someday may have to be made with respect to any other issue concerning the judge's instructions. Should petitioner raise such a claim in a subsequent petition, the Court trusts that respondent will see fit to provide the Court with the transcript it ought to have provided in the instant petition.

The Supreme Court held in *In re Winship*, 397 U.S. 358 (1970), that due process requires the state to prove beyond a reasonable doubt all elements of the offense with which a defendant is charged. Drawling upon *Winship*, the Court, in *Mullaney v. Wilbur, supra*, found constitutionally invalid a Maine homicide rule that required the accused to demonstrate by a preponderance of evidence that he acted in the heat of passion before he could be convicted of manslaughter instead of murder. More specifically, the Court found that under Maine law absence of provocation was a necessary element of murder, and, as such, the state must prove it beyond reasonable doubt once the issue has been properly raised. *Mullaney v. Wilbur, supra*, at 703-04.

To be sure, there is some dicta in *Mullaney* that suggests the states cannot constitutionally place the burden of proving any affirmative defense on a criminal defendant. That such dicta was intended as a constitutional standard, however, was specifically rejected in *Patterson v. New York*, 432 U.S. 197 (1977). *Patterson* involved a New York procedure permitting a defendant to assert as an affirmative defense "extreme emotional disturbance", which is proven by a preponderance of the evidence, reduces the offense from murder to manslaughter. In upholding the New York scheme, the Court noted:

> It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Patterson v. New York, supra*, at 201-02 (citations omitted).

The fundamental principle which limits the otherwise wide latitude a state has in regulating the enforcement of its criminal law is that "a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon

proof of the other elements of the offense." *Patterson v. New York, supra,* at 215. *See also id.* at 206-07, 210, 211 n. 12. The procedure involved in *Mullaney,* therefore, was unconstitutional because it required a defendant to negate an essential element of the crime. *Patterson v. New York, supra,* at 215. On the other hand, the defense involved in *Patterson* was a true affirmative defense—a defense that instead of negating an element of the crime offers an excuse. *Patterson v. New York, supra,* at 206-07.

The Court notes that the issue presented in the instant petition—whether a defendant can constitutionally be made to carry the burden of proving self-defense—is a question the Supreme Court specifically refused to answer in *Hankerson v. North Carolina,* 432 U.S. 233 (1977). In view of *Patterson,* the Court doubts that the constitutionality of this issue can be answered removed from the context of a particular jurisdiction's substantive law. But whatever the constitutionality of the practice may be elsewhere, the Court believes that Ohio practice, as it existed at the time of petitioner's trial, was not "fundamentally unfair."

Petitioner was convicted of murder, which Ohio Revised Code Section 2903.02 (A) defines as (1) purposely[4] (2) causing (3) the death (4) of another. The prosecution must prove all these elements beyond a reasonable doubt before a defendant can be convicted. No other elements are presumed or inferred. By virtue of its common law, Ohio, at least at the time of petitioner's trial, exused what otherwise would be murder if the defendant could prove self-defense by a preponderance of the evidence.

Unlike the defense involved in *Mullaney,* however, evidence supporting a defendant's claim of self-defense "bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime." *Mullaney v. Wilbur,*

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[4]Section 2901.22(a) of the Ohio Revised Code defines "purposely" as follows:

> A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

supra, at 706 (Rehnquist, J., concurring). When petitioner was convicted, self-defense in Ohio was a true affirmative defense like the defense involved in *Patterson* and the insanity defense involved in *Leland v. Oregon*, 343 U.S. 790 (1952). Instead of negating an element of the crime, the defense admitted the commission of the act charged with the necessary mental element but sought to avoid the consequences by showing a lawful excuse or justification. In this sense the defense was likened to the common law concept of confession and avoidance. *See* Comment, *Affirmative Defenses in Ohio After Mullaney v. Wilbur*, 36 Ohio St. L.J. 828, 840-41 (1975); 27 O. Jr. 2d, Homicide Section 89 at 630.

As the Court in *Patterson* noted:

> The Due Process Clause, as we see it does not put [the States] to the choice of abandoning [affirmative] defenses or undertaking to disprove their existence in order to convict of a crime which otherwise is within [their] constitutional powers to sanction by substantial punishment.

Patterson v. New York, *supra*, at 207-08. Due process, however, does require the state to prove every element of the crime beyond a reasonable doubt. Thus, a procedure that allows a defendant to prevail in his "affirmative defense" only if he negates a necessary element of the crime by a preponderance of the evidence unconstitutionally puts the state's burden on the defendant. But in Ohio, proof of self-defense did not negate or otherwise bear a necessary relationship with any element of the crime the state had to prove beyond a reasonable doubt in order to convict. As such, the Court concludes that Ohio's decision to put the burden of proving the defense on petitioner did not unconstitutionally shift to petitioner the burden of proof. Due process was satisfied when the state proved beyond a reasonable doubt that petitioner purposely caused the death of another.

Petitioner contends, however, that this line of reasoning is in conflict with *Berrier v. Egeler*, 583 F. 2d 515 (6th Cir. 1978), which held that the petitioner was denied due process when a Michigan trial court instructed the jury that the burden of proving self-defense was on the petitioner. But the procedure challenged in the instant petition is fundamentally different from the

procedure involved in *Berrier;* namely, *Berrier* dealt with a situation in which absence of self-defense was an essential element of the crime. *See Berrier v. Egeler, supra,* at 521. *Berrier* did not hold that due process always requires the prosecution to prove the absence of self-defense, or to phrase it differently, that a defendant can never be saddled with the burden of persuasion. *See Berrier v. Egeler, supra,* at 524 (Engel, concurring). Rather, *Berrier* simply stands for the proposition that the state must prove the absence of self-defense once the state has made the absence of self-defense an element of the crime. As previously mentioned, absence of self-defense was not an element of the crime in Ohio when petitioner was convicted, nor was proof of the defense in any way related to any fact the prosecution was required to prove.

For the foregoing reasons,

IT IS ORDERED that the instant petition for a writ of habeas corpus must be and hereby is denied.

Signed by
UNITED STATES DISTRICT JUDGE

Toledo, Ohio.

December 19, 1978.

No. C 78-343

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[FILED JAN. 23, 1979]

KENNETH L. BELL,

Petitioner,

vs.

E.P. PERINI, Supt.,

Respondent.

OPINION AND ORDER

WALINSKI, J:

This cause came to be heard on petitioner's motion for reconsideration. By Order filed December 26, 1978, the Court denied the petition for a writ of habeas corpus as to the sole ground for relief presented. More specifically, the Court held that it was not unconstitutional for the State to place on petitioner the burden of proving self-defense by a preponderance of the evidence since "proof of self-defense did not negate or otherwise bear a necessary relationship with any element of the crime which the State had to prove beyond a reasonable doubt in order to convict." Petitioner now states that the Court misunderstood the "real issue" presented in his earlier petition. Conceding for the sake of argument the constitutionality of a procedure which places the burden of proving an affirmative defense on the defendant, plaintiff maintains that Ohio did not have such a procedure at the time of his trial.

Petitioner's argument is based on Ohio Revised Code Section 2901.05 (A), which provides:

> Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused.

In *State v. Robinson*, 47 Ohio St. 2d 103 (1976), the Ohio Supreme Court held that this provision requires the State to prove the absence of self-defense once a defendant has raised the issue by going forward with evidence suggesting self-defense But at the time of petitioner's trial, the meaning which the Court in *Robinson* attached to Ohio Revised Code Section 2901.05(A) was not, as petitioner contends, the law in Ohio. In every meaningful sense, the law was that Section 2901.05 (A) had not altered Ohio's common law practice of placing on a defendant the burden of proving an affirmative defense by a preponderance of the evidence.[1]

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[1]At the time of petitioner's trial no court in Ohio (at least, no court in a written opinion) had held or even indicated that Ohio Revised Code Section 2901.05(A) had modified the common law. The leading treatises certainly saw no change in the law. 1 *Anderson's Ohio Criminal Practice and Procedure* Section 52.15 (1975 ed.); 1 O. Schrader and L. Katz, *Ohio Criminal Law Practice*, Titl. 29 at 14 (1974 ed.). The Ohio Supreme Court gave credence to this view when, in *State v. Rogers*, 43 Ohio St. 2d 28 (1975), it said:

> [S]elf-defense is an affirmative defense, which must be established by a preponderance of the evidence (*State v. Seliskar* [1973], 35 Ohio St. 2d 95, 96)

Id. at 30. With respect to Section 2901.05, the Court further stated:

> The defense of using reasonable force to effect a citizen arrest *** is *** an affirmative defense (R.C. 2901.05[C] [2]) which places the burden of going forward with the evidence upon the accused (R.C. 2901.05[A] *to prove that issue by a preponderance of the evidence. See State v. Seliskar, supra* (35 Ohio St. 2d 95). (*Emphasis added.*)

Id. at 33. One commentator, after the Ohio Supreme Court's decision in *Rogers*, noted:

> If past treatment of the issue by the courts and legislative intent were the only considerations to weigh in determining who will bear the burden of persuasion on affirmative defenses in future trials, it is likely that Ohio defendants will continue to shoulder that burden.

Comment, *Affirmative Defenses in Ohio After Mullaney v. Wilber*, 36 Ohio St. L.J. 828, 829-30 (1975).

To be sure, the language quoted from *Rogers* was dicta, and, as a consequence, at the time of petitioner's trial the question of who must bear the burden of proving an affirmative defense had not been definitively answered. But one need not adopt the radical position, attributed to Gray and Salmond, that a statute is not a law until interpreted by the courts, to conclude that the law at the time of petitioner's trial was not what *Robinson* later held it to be. *Compare* Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 460-61 (1897) *with* H.L.A. Hart, *The*

Thus, the "real issue" presented in the instant petition is not whether the trial judge's instruction to the jury as to who had the burden of proving self-defense was inconsistent with Ohio law. It is instead whether petitioner is entitled to the retroactive application of *State v. Robinson*. The Court concludes he is not.

As a preliminary, the Court notes that the Constitution does not require the retroactive application of a new interpretation of a statute. *See, e.g., Halliday v. United States*, 394 U.S. 831 (1969). *See also* R. Dickerson, *The Interpretation and Application of Statutes* 255-57 (1975). The decision to apply a new rule retroactive, effective immediately, or prospective is essentially one of policy, the wisdom of which this Court is not in a position to judge. Petitioner, therefore, is entitled to the benefits of Section 2901.05 (A) as established in *Robinson* only if 1) he is within that class of persons the Ohio Supreme Court has determined *Robinson* applies to, or 2) (and the point is debatable) he has been excluded from claiming the benefits of *Robinson* by a decision which is arbitrary, capricious, or violative of the equal protection clause.

The Ohio Supreme Court has decided to apply *Robinson* retroactively, but only if the issue properly was preserved at trial and raised on appeal. *State v. Humphries*, 51 Ohio St. 2d 95, 102-03 (1977). As a matter of state law, therefore, petitioner is not entitled to the benefits of the *Robinson* decision.[2] Moreover, this Court can find nothing wrong, as a matter of federal constitutional law, with the Ohio Supreme Court's decision to apply *Robinson* only to those who did not waive the issue. Even assuming this rule can be tested against principles of equal protection or substantive due process, *but see Milwaukee Electric Ry. Co. v. Wisconsin*, 252 U.S. 100 (1920); *Beck v. Washington*, 369 U.S. 541 (1962); *United States ex rel. Almeida v. Rundle*,

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Concept of Law 132-144 (1961). Indeed, the fact that the Ohio Supreme Court had to decide whether to apply *Robinson* retroactively is, the Court believes, strong evidence that the Ohio Supreme Court recognized it had worked a substantial change in the law in *Robinson*.

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[2]Though it is unclear whether petitioner raised the issue at trial, it is clear that he did not raise it on appeal. *See* Rule 12(A), Ohio Rules of Appellate Procedure.

255 F. Supp. 936 (E.D. Pa. 1966), *aff'd*, 383 F. 2d 421 (3rd Cir. 1967), *cert. denied*, 393 U.S. 863 (1968), certainly its application substantially furthers the State's legitimate interest in the finality of its decisions. *See Blackledge v. Allison*, 431 U.S. 63, 71-72 (1977). Indeed, the United States Supreme Court has indicated that a rule such as the one adopted in Ohio is a legitimate method of insulating past convictions against the retroactive application of new constitutional standards. *Hankerson v. North Carolina*, 432 U.S. 233, 244 n. 8 (1977).

For the reasons set out in this Court's prior Order, it was not a denial of due process for the State to place the burden of proving self-defense by a preponderance of the evidence on petitioner. For the reasons set out above, petitioner was not entitled to the benefits of *State v. Robinson*. Accordingly,

IT IS ORDERED that the petitioner's motion for reconsideration is overruled.

Signed By
UNITED STATES DISTRICT JUDGE

Toledo, Ohio.
January 22, 1979.

No. 79-3570

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[FILED DEC. 18, 1980]

HOWARD HUGHES,
Petitioner-Appellant,
vs.
TED ENGLE, SUPT.,
Respondent-Appellee.

ORDER

BEFORE: KENNEDY and MARTIN, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Hughes appeals the denial of his petition for writ of habeas corpus after conviction in a state court in Ohio in January 1975 of voluntary manslaughter. The state trial court charged the jury that Hughes must establish his defense of self-defense by a preponderance of the evidence.

In light of the decision of this Court in *Isaac v. Engle*, No. 78-3488, (6th Cir., December 12, 1980) (en banc) (Kennedy, J., dissenting), the judgment of the District Court is reversed and the action remanded to the District Court with directions to grant the writ unless the State of Ohio chooses to retry Hughes within a reasonable time.

ENTERED BY ORDER OF THE COURT

Signed by
John P. Hehman, Clerk

No. 79-3570

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[FILED JAN. 21, 1981

HOWARD HUGHES,
Petitioner-Appellant,

vs.

TED ENGEL, SUPERINTENDENT,
CHILLICOTHE CORRECTIONAL FACILITY,
Respondent-Appellee

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

Signed by
John P. Hehman, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action C77-156A

[FILED JAN. 26, 1979]

HOWARD HUGHES

Petitioner

vs.

TED ENGLE, Superintendent

Respondent

JUDGMENT ENTRY

The Court having denied the petition for habeas corpus relief under 28 U.S.C. Section 2254,

IT IS ORDERED, ADJUDGED, AND DECREED that this action is hereby dismissed.

Signed by
Leroy J. Contie, Jr.
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action C77-156A

[FILED JUN. 26, 1979]

HOWARD HUGHES

Petitioner

vs.

TED ENGLE, Superintendent

Respondent

ORDER

This is an action for habeas corpus relief under 28 U.S.C. Section 2254. Pursuant to this Court's Order, the instant action was referred to the U.S. Magistrate for a report and recommended disposition of the matter. The Magistrate filed his report on August 10, 1977, and recommended that the petition for writ of habeas corpus be denied. Thereafter, petitioner filed objections to said report. Subsequently, the Court granted the parties leave to file additional briefs.

Upon consideration of the Magistrate's Report and Recommendation and independent review of the entire record in this action, the Court concludes that an evidentiary hearing is not required and that the petition shall be denied.

Petitioner was indicted by the Grand Jury of Summit County, Ohio, September 1974 term, for aggravated murder in violation of Ohio Revised Code Section 2903.01 (A). After entering a plea of not guilty, he was found guilty by a jury on September 24, 1975 of the lesser included charge of voluntary manslaughter, Ohio Revised Code Section 2903.03. Petitioner was sentenced to imprisonment for a period of from six to twenty-five years. The conviction was affirmed on appeal and the Supreme Court of Ohio denied review.

Thereafter, petitioner initiated the instant action for habeas corpus relief. As grounds therefor he asserts that the trial court's instruction placing upon him the burden of proving self-defense violated his right to due process of law under the Fourteenth Amendment. Petitioner also claims a denial of due process as a result of allegedly highly prejudicial comments by the prosecution. The Court, having found exhaustion of available state remedies in its Order of June 4, 1979, shall separately address each of petitioner's claims.

With regard to the first ground advanced in support of the petition, the record shows that the trial court charged the jury on aggravated murder, murder, and voluntary manslaughter. He then stated that petitioner "claims that what he did was justified on the basis of self-defense." After defining the elements of self-defense, the trial court proceeded as follows:

> The burden of proving the Defense of Self-defense is upon the Defendant. He must establish such Defense by a preponderance of the evidence.
>
> If the Defendant fails to establish the Defense of Self-defense, the State still must prove all of the essential elements of the crime charged or any lesser included offense by proof beyond a reasonable doubt.
>
> If you find that the State proved beyond a reasonable doubt all of the essential elements of the crime of Aggravated Murder, or of the lesser included charges, and that the Defendant failed to prove by a preponderance of the evidence the Defense of Self-defense, your verdict must be guilty as to the charge of Aggravated Murder, or the lesser included charges.
>
> If you find that the State failed to prove beyond a reasonable doubt any one of the essential elements of the crime of Aggravated Murder, or any of the lesser included charges, or if you find the Defendant proved by a preponderance of the evidence the Defense of Self-defense, then you must find the Defendant not guilty.

(Tr. at 342-43). Petitioner claims that this instruction violates due process.

Initially, at the time of petitioner's trial, Ohio law was construed to require a defendant to prove an affirmative defense by a preponderance of the evidence. See *State v. Seliskar*, 35

Ohio St. 2d 95 (1973); *State v. Rogers*, 43 Ohio St. 2d 28 (1975), cert denied, 423 U.S. 1061 (1976). Subsequently, however, section 2901.05 of the Ohio Revised Code, effective January 1, 1974, was interpreted to place upon a defendant only the burden of going forward with evidence sufficient to raise the affirmative defense of self-defense. *State v. Robinson*, 47 Ohio St. 2d 103 (1976). Thereafter, said interpretation was held to apply to all criminal trials conducted after January 1, 1974. *State v. Humphries*, 51 Ohio St. 2d 95 (1977). It is thus apparent that the trial court's instruction herein was erroneous under Ohio law. Nevertheless, in order to prevail in a federal habeas corpus action, this instruction must constitute constitutional error.

Due process requires that the state prove beyond a reasonable doubt that every fact necessary to constitute the crime with which an accused is charged. *In Re Winship*, 397 U.S. 358, 364 (1970). The state cannot consistent with due process shift the burden of proof to the accused by presuming an essential element of the crime upon proof of the other elements. *Mullaney v. Wilbur*, 421 U.S. 684 (1975). It is not required, however, to prove beyond a reasonable doubt the nonexistence of an affirmative defense which the state recognizes as an exculpatory or mitigating circumstance affecting the degree of culpability or punishment. *Patterson v. New York*, 432 U.S. 197, 207-209 (1977). As clearly stated by the Supreme Court:

> We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interest against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.

Id. at 210. Rather, the state can constitutionally burden the accused with proving an affirmative defense which does not negate any facts of the crime that the state must prove in order to convict. *Id.*

Petitioner was convicted of voluntary manslaughter which is defined as "knowingly causing the death of another while under extreme emotional stress, brought on by serious provocation reasonably sufficient to incite the Defendant into using deadly force." (Tr. 337-38). Ohio Rev. Code Section 2903.03. The state was required to prove each of these elements beyond a reasonable doubt. No other elements are either presumed or inferred. In Ohio, the absence of self-defense is not an element of aggravated murder, murder, or voluntary manslaughter. *Cf. Berrier v. Egeler*, 583 F. 2d 515 (6th Cir. 1978). Rather, self-defense will excuse the unlawfulness of an act otherwise criminal. *State v. Gideons*, 52 Ohio App. 2d 70, 74 (1977). It is a justification or exculpatory circumstance whereby punishment for conduct otherwise considered criminal is avoided. The elements or facts constituting self-defense are independent of and do not bear a necessary relationship to the required elements of voluntary manslaughter, murder or aggravated murder. Further, a jury instruction that the state must prove the absense of self-defense or disprove self-defense beyond a reasonable doubt is not mandated. *State v. Abner*, 55 Ohio St. 2d 251 (1978). Thus in Ohio, self-defense is a true affirmative defense which does not negative any facts of the crime charged that the state must prove beyond a reasonable doubt in order to convict. This is and was the law in Ohio at the time of petitioner's trial.

In view of the foregoing, the Court concludes that the trial court's instruction placing the burden of proving self-defense upon petitioner did not violate due process. See *Henderson v. Jago*, Civil Action No. C78-503 (N.D. Ohio May 15, 1979); *Bell v. Perini*, Civil Action No. C78-343 (N.D. Ohio December 26, 1978); *Hooper v. Perini*, Civil Action No. C78-368 (N.D. Ohio December 26, 1978). There was no unconstitutional shifting of the state's burden to petitioner to negate an essential element of voluntary manslaughter, murder, or aggravated murder. On the contrary, due process was satisfied when the state proved beyond a reasonable doubt the facts constituting voluntary manslaughter.

Further and alternatively, the Court concludes that petitioner is not entitled to relief on his first claim for failing to specifically object to the trial court's instruction regarding self-defense. Failure to comply with Ohio's contemporaneous objection rule, Rule 30, Ohio Rules of Criminal Procedure, precludes federal habeas corpus review unless petitioner demonstrates cause for noncompliance and actual prejudice. *Wainwright v. Sykes*, 433 U.S. 72 (1977). Petitioner has offered no explanation or justification for failing to object to the trial court's instruction at the time of trial. Nor has any actual prejudice to the petitioner been shown; the Court has not found any constitutional error or error that infected the fundamental fairness of the trial. *Cf. Berrier v. Egeler*, 583 F. 2d 515 (6th Cir. 1978); *Canary v. Bland*, 583 F. 2d 887 (6th Cir. 1978); *Rachel v. Bordenkircher*, 590 F. 2d 200 (6th Cir. 1978). Thus, the Court is of the opinion that federal habeas corpus review of the petitioner's first claim should be barred. *Wainwright v. Sykes, supra.*

As his second ground for relief, petitioner alleges a denial of due process and fundamental fairness as a result of prejudicial comments by the prosecutor. Specifically, he urges that certain remarks of the prosecutor during cross examination of petitioner and in final argument were extensive, and had a tendency to mislead the jury and to prejudice petitioner. Further, petitioner claims that the trial court's instructions to the jury to disregard such comments were futile.

In order to constitute a constitutional violation, it is necessary that the prosecutor's comments rendered petitioner's trial "so fundamentally unfair as to deny him due process." *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). A determination of fundamental unfairness is to be made after careful review of the totality of the circumstances. *Hayton v. Egeler*, 555 F. 2d 599, 604 (6th Cir. 1977).

Upon review of the transcript of petitioner's trial, the Court cannot find that the prosecutor's conduct rises to the level of a constitutional violation. The trial court sustained objections made by petitioner's counsel to improper remarks of the prosecutor, and admonished the jury to disregard such comments and the inferences contained therein. Additionally, the trial court in its charge instructed and cautioned the jury that:

> The evidence, however, does not include the Indictment, the Opening Statements of Counsel or the Closing Arguments of Counsel. The Opening Statements and Closing Arguments of Counsel are designed to assist you. They are not evidence.
>
> Statements or answers that were stricken by the Court, or which you were instructed to disregard, are not evidence and must be treated as though you had never heard them.
>
> You must not speculate as to why the Court sustained the objection to any question, or what the answer to such question might have been. You must not draw any inference or speculate on the truth of any suggestion included in a question that was not answered.

(Tr. at 332). Contrary to petitioner's assertions, these specific admonitions and instructions served to mitigate any overall effect of the prosecutor's comments. Therefore, the Court concludes that petitioner was not deprived of a fundamentally fair trial.

Accordingly, the instant petition is hereby denied and this action shall be dismissed.

IT IS SO ORDERED.

Signed by
Leroy J. Contie, Jr.
U.S. District Judge

No. 79-3317

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT CARTER,
Petitioner-Appellant,
vs.
ARNOLD R. JAGO,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Ohio, Eastern Division.

[DECIDED AND FILED DEC. 22, 1980]

Before: Celebreeze, Brown and Kennedy, Circuit Judges.

Celebrezze, Circuit Judge, delivered the opinion of the Court in which Brown, Circuit Judge, concurred. Kennedy, Circuit Judge, (p. 19) delivered a separate opinion concuring in part and dissenting in part.

Celebrezze, Circuit Judge. In 1973, petitioner Robert Carter was convicted of murder in the second degree by a jury in Cuyahoga County, Ohio. The Cuyahoga County Court of Appeals affirmed the conviction. In his appeal to the Ohio Supreme Court, Carter raised several additional allegations of error not presented to the appeals court. The Ohio Supreme Court denied petitioner's motion for leave to appeal for lack of a substantial constitutional question.

In 1977, Carter filed a petition for a writ of habeas corpus with the United States District Court for the Northern District of Ohio. In the return of writ the respondent suggested that Carter had failed to exhaust available state remedies and that a delayed appeal was available under Rule 5 of the Ohio Rules of Appellate Procedure. While the matter was pending in the Federal District Court, a motion for leave to file a delayed appeal was entered by Petitioner, in essence raising the issues previously raised for the first time before the Ohio Supreme Court. This motion was denied by the Cuyahoga County Court of Appeals and on appeal the Ohio Supreme Court dismissed the appeal as of right and also overruled a motion for leave to appeal. District Judge William K. Thomas thereafter denied habeas corpus relief to

Carter and this appeal followed. We now affirm the decision of the District Court.

FACTS

In May of 1973, Mr. John Knific was residing at the Milner Colonial Hotel located on Prospect Avenue in Cleveland. On May 22, 1973, Mr. Knific entered the hotel at approximately 2:15 a.m. in the company of another man. Knific informed the desk clerk, Henry Dora, that the man was his guest and that both were going to Knific's room. Knific, who had lived at the hotel for approximately two years, was at that time living in Room 614. Shortly after Knific and the other man left the lobby for Knific's room, Mr. Stanley Orack, the day clerk was informed by Dora that Knific had taken a guest to his room. Mr. Orack was living directly adjacent to Knific's room.

At approximately 3:00 a.m., Mr. Dora received a call from Knific's room requesting an outside number. The hotel telephone system required that all outgoing calls be placed through the main switchboard. Knific gave Dora the first three digits of the number, 481, at which time Dora heard scuffling and a shot. Dora immediately called Orack's room to inform him of the trouble, and then called the police. Dora testified that Knific sounded calm when he requested the number.

Just before receiving Dora's call, Stanley Orack was watching television in his room. Orack heard scuffling and two or three loud crashes from the direction of Knific's room. After telling Dora to call the police, Orack went to Room 614 and knocked on the door. Mr. Orack stated that when he first approached the room, he could hear dresser drawers opening and closing. After his knock, the room became quiet, and then Carter opened the door. Orack told Carter that he would have to wait until the police arrived, at which time Carter reached into his waistband. Orack knocked Carter to the floor and when Carter started to get up, he had a pistol in his hand. Orack immediately returned to his room where he waited until he heard the police arrive. While he was waiting in his room, Orack heard someone rattling on his door; when he left the room, he noticed blood on his doorknob.

Patrolmen Galka and Couzer received a radio call directing them to the Milner Hotel at approximately 3:10 a.m. As they arrived on the sixth floor and started down the hallway toward Room 614, they were met by Carter who was running in their direction. Carter had blood on his head from the blow he received from Orack. He was apprehended, searched, and found to be carrying a .22 caliber revolver containing three spent shells and one live round. John Knific died on June 27, 1973, as a result of the gunshot wounds he received.

Carter testified at trial and admitted having shot John Knific. His testimony is summarized by the state court of appeals as follows:

> The appellant testified that he and Mr. Knivic went to Mr. Knivic's hotel room to engage in homosexual acts. When both men were undressed, Mr. Knivic allegedly told the appellant that he enjoyed beating people. (R. 232). The appellant further testified that this remark made him afraid for his life. (R. 232). The appellant made an attempt to dress himself, but at that time he was grabbed by Mr. Knivic, and the appellant, who had a gun in the pocket of his jacket, reached for his gun and shot Mr. Knivic. The appellant stated that he didn't intend to shoot the decedent but rather that he was pulling the trigger when he thought the chamber of the gun was empty to frighten him. (R. 238). The decedent received three bullet wounds. The decedent died one month after the shooting, allegedly as the result of the gunshot wounds.

The jury, however, returned a verdict of guilty of murder in the second degree. As a result, the petitioner was sentenced to life imprisonment.

I.

Initially, Carter alleges error by the district court in failing to conduct an evidentiary hearing on the question of exhaustion of state remedies. The basis of this contention is difficult to discern. Admittedly, Carter raised several issues for the first time in his appeal to the Ohio Supreme Court. Since exhaustion was solely an issue of law, the district court had only to determine whether any state remedy was still available. The district court, in ruling on exhaustion noted that the court of appeals had indicated that petitioner could raise the issues presented in the delayed appeal in a post conviction proceeding in the trial court. Thus, there was reason to doubt whether Carter had exhausted all available state remedies.

In the interim of this appeal, this court decided *Collins v. Perini*, 594 F. 2d 592 (6th Cir. 1979), and *Keener v. Ridenour*, 595 F. 2d 581 (6th Cir. 1979), which hold that neither a delayed appeal nor a post conviction appeal would be available to one, such as petitioner, who has already had an appeal. Petitioner's habeas petition is properly before the court for decision then. The district court's decision, however, was not founded only upon the exhaustion issue. The observation that petitioner might have further state remedies available was an afterthought to a conclusion that Carter had waived several claims he sought to present in his petition. We now turn to those claims.

II.

In his instruction to the jury the trial judge charged the jury that the burden of proof was on the defendant to prove the affirmative defense of self-defense by a preponderance of the evidence. At the time of trial, state law clearly mandated the instruction issued by the trial judge. *State v. Seliskar*, 35 Ohio St. 2d 95 (1973).[1] The critical portions of the charge are as follows:

> The law says this defendant cannot be convicted of any offense in the charge of this indictment notwithstanding the fact that he may have killed John Knivic if, at the time of committing such offense he was acting in self-defense.

[1] *Seliskar* was grounded upon the well-established common law rule that allocated to the defendant the burden of proving affirmative defenses by a preponderance of the evidence. Ohio Rev. Stat. 2901.05(A), effective January 1, 1974, contained no language relative to the burden of proof for affirmative defenses. The Ohio Supreme Court construed 2901.05(A) in *State v. Robinson*, 47 Ohio St. 2d 103 (1976), and held that in a criminal case involving the affirmative defense of self-defense, the defendant has only the burden of going forward with evidence sufficient to raise that defense. *Robinson* received retroactive effect in *State v. Humphries*, 51 Ohio St. 2d 95 (1977). The 1978 Amendment to 2901.05(A) effectively changed the rule of *Robinson* so as to reinstate the common law rule requiring a defendant to prove an affirmative defense by a preponderance of the evidence. This requirement has been held to be constitutional in *State v. Newell*, Ohio App. 2d (#40470 Dec. 28, 1979) (8th App. Dist.).

Self-defense in a proper case is the right of every person. The essential elements of self-defense are these:

First, the defendant must be free from fault, that is, he must not have provoked the defendant or purposely brought on the combat.

Second, there must be present a pending peril to life or great bodily harm, either real or apparent as to create the bona fide belief of an existing assassin.

Now, a man may repel force by force even to the extent of taking a life in the defense of his person. A bare fear, however, of being killed or receiving bodily harm is not sufficient to justify one inflicting serious injury or death upon another. It must appear that the circumstances were sufficient to excite the fear of a reasonable person similarly situated as the defendant and the defendant acted in good faith and in viewing the situation and circumstances from his standpoint, really acted under the influence of such fear and not in the spirit of malice or revenge.

Now, that is this: the jury is to look at the situation from the standpoint of the defendant himself at the time he acted as charged in the indictment and determine under the circumstance of stress and excitement surrounding him whether, without fault or carelessness on his part he did honestly believe he was in imminent danger of losing his life or receiving great bodily harm, and to prevent this it was necessary for him to act as he did act.

When a person in the lawful pursuit of his business, and without blame, is violently assaulted by one who manifestly and maliciously intends and endeavors to kill him, the person so assaulted, without retreating, although it says it may be in his power to do so without increasing his danger, may kill his assailant to save his own life or protect himself from great bodily harm.

The law of self-defense is the law of necessity, pure and simple. It is not an offensive law, but it is a defensive law and the burden of proving it rests upon the defendant, so he is not called upon to establish the defense beyond a reasonable doubt.

It is sufficient if he establishes it by a preponderance of the evidence. Now, by preponderance of the evidence is meant the greater weight of the evidence, that evidence in the case which is more convincing of its truth and which influences the minds of the jury; the minds of the jury in the conclusion you reach, the evidence in the case which you find be entitled to the greater weight.

> Now, if you find by a preponderance of the evidence that the defendant, Robert Carter, in careful and proper use of his faculties and without wrong on his part, in good faith believed and had reasonable grounds to believe that at the time of the shooting he was in imminent danger of death or of great bodily harm at the hands of the deceased, John Knivic, and that his only means of escape from the danger was taking the life of the deceased, he would be justified in so doing even though in fact the defendant may have been mistaken as to the imminence of the danger.

Although no objection was raised to this charge at trial or registered in the court of appeals, Carter raised this instruction as an assignment of error in his memorandum in support of jurisdiction in the Ohio Supreme Court, which dismissed the appeal for want of substantial constitutional question. He now reiterates this claim in his habeas petition.

Petitioner argues that the imposition of the burden of proof on him regarding the issue of self-defense violated due process. Primary reliance is placed upon *Mullaney v. Wilbur*, 421 U.S. 684 (1975), which makes clear that the state has the burden of proving every element of the crime beyond a reasonable doubt. In that case the state of Maine required a defendant charged with murder to prove that he acted in the heat of passion on sudden provocation in order to reduce a homicide charge to manslaughter. The Supreme Court concluded that since the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged, *In re Winship*, 397 U.S. 358 (1969), it must also prove the absence of heat of passion, which is malice beyond a reasonable doubt.[2]

In general terms, Mullaney held that the Fourteenth Amendment's guarantees prohibit a State from shifting to the defendant

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[2]In a footnote the Court indicated that states may place a burden of *production* on the defendant without offending the intent of *Mullaney*. States can require the defendant to produce "some evidence" demonstrating action in the heat of passion before requiring the prosecution to negate this element. 421 U.S. at 701 n. 28. Thus, while *Mullaney* proscribed the use of presumptions which shift the evidentiary burden onto the defendant for establishing certain facts, the decision did not circumscribe all procedural presumptions which require a defendant to introduce evidence contesting the otherwise presumed or inferred facts.

the burden of disproving an element of the crime charged when the state has presumed its existence. In *Hankerson v. North Carolina*, 432 U.S. 233 (1977), a unanimous Supreme Court gave retroactive effect to *Mullaney* because the major purpose of the doctrine illuminated in *Mullaney* was to enhance the truth-finding function of a criminal trial so as to erase the serious questions about the accuracy of guilty verdicts in past trials.

The state first argues that, even though Carter had the burden of proof in proving self-defense, federal habeas corpus review is precluded by his failure to object at trial to the jury instructions. *Hankerson v. North Carolina*, 432 U.S. 233, 245 n. 8 is cited for the proposition that failure to comply with state procedural objection requirements, as regards objecting to jury instructions, bars collateral attack. This procedural default argument centers around language in *Hankerson* suggesting that a state could minimize the impact of retroactively applying *Mullaney* by enforcing its "normal and valid" procedural rule "that failure to object to a jury instruction is a waiver of any claim of error." The notation consequently raises the contemporaneous objection rule discussed in *Wainwright v. Sykes*, 433 U.S. 72 (1977).[3]

Since petitioner failed to object at trial to the jury instructions, his threshold task is to satisfy the "cause" and "prejudice" standards of *Wainwright v. Sykes, supra*. Carter submits that the intervening *Mullaney* decision is adequate cause for his failure to object. This argument assumes that *Mullaney* would invalidate the jury instructions on self-defense and that because this development could not anticipated,[4] the failure to object should

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[3]Ohio Rule of Criminal Procedure 30 requires as a prerequisite to raising an allegation of error regarding a jury instruction that the party object at trial, stating specifically the grounds for his objection. Failure to raise an objection is tantamount to a procedural default and is not reviewable on appeal absent plain error or a defect affecting substantial rights. O.R.C.P. Sec. 52a; *State v. Long*, 53 Ohio St. 2d 91 (1978); *State v. Lockett*, 49 Ohio St. 2d 48 (1976), overruled in part on other grounds in *State v. Downs*, 51 Ohio St. 2d 47, vacated, 438 U.S. 909 (1978). *Hockenbury v. Sowders*, 620 F. 2d 111 (6th Cir. 1980), makes clear that the standard of review established by *Wainwright* controls petitioner's claims.

[4]The common law had historically regarded self-defense as an affirmative defense to be proved by the accused.

be excused. At the very least, *Mullaney* raised a substantial spectre of doubt as to the constitutionality of Ohio's placement of the burden of proof regarding self-defense. And, it was not the responsibility of trial counsel to fathom or predict the change in due process doctrine that *Mullaney* would occasion. *Isaac v. Engle,* F.2d (6th Cir. 1980) (en banc) holds that in such a situation the absence of any plausible reason for raising an objection will provide the necessary "cause," and "prejudice" will be presumed if the burden of proof is shifted to the defendant when he has produced sufficient evidence to raise the defense of self-defense. Accordingly, petitioner's claim is cognizable in this habeas corpus proceeding.

The gravamen of petitioner's claim is that the Ohio law allocating to the defendant the burden of proving self-defense by a preponderance of the evidence violates principles of due process explicated in *Mullaney. Mullaney* prohibits the State from *presuming* that an element of the crime exists and then placing the burden of proving otherwise on the accused. *Patterson v. New York,* 432 U.S. 197 (1977), reinforces this principle that so long as the legislature does not transgress constitutional limits by defining the elements of a crime so as to create a presumption of the existence of a fact or facts essential to guilt, due process has not been violated. *Patterson* makes clear that the applicability of the reasonable doubt standard is dependent upon how the State defines the offense that is charged in any given case; unless expressly defined by statute, material elements do not include the nonexistence of a fact which, if proven, would constitute a statutory defense. Yet once the elements of a crime are defined by the legislature, each element must be proven beyond a reasonable doubt by the State.

Petitioner was charged with murder in the first degree and murder in the second degree. O.R.C. 2901.01, in effect at the time of trial, contained the following definition:

> 2901.01 Murder in the first degree. (GC 12400, 12399)
>
> No person shall purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery, or burglary, kill another.

> Whoever violates this section is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommends mercy, in which case the punishment will be imprisonment for life.
>
> Murder in the first degree is a capital crime under Sections 9 and 10 of Article, Ohio Constitution.

Court interpretation of the statute has isolated three "elements" of murder in the first degree: 1) an actual killing; 2) intent, *State v. Farmer*, 156 Ohio St. 214, 102 N.E. 2d 11 (1952); *Palfry v. Cardwell*, 448 F. 2d 328 (6th Cir. 1971); and 3) deliberate and premeditated malice, *State v. Butler*, 11 Ohio St. 2d 23, 227 N.E. 2d 627 (1967).

The jury instructions issued by the trial judge were in accord with these requirements:

> Murder in the first degree is the killing of another purposely and with deliberate and premeditated malice.
>
> Let me say to you that the defendant in this case entered a plea of not guilty and by so doing he puts in issue each and every one of the essential elements of the crime of murder in the first degree before you can find the defendant guilty, you must find beyond a reasonable doubt, one, that John Knivic was a living person and he was killed by the defendant in Cuyahoga County on or about the 27th day of June, 1973. Two, that the killing was done purposely. Three, that the killing was done with deliberate and premeditated malice.

Carter was also charged with, and eventually convicted of, murder in the second degree.

Murder in the second degree was defined by statute as follows:

> 2901.05 Murder in second degree (CC 12403)
>
> No person shall purposely, and maliciously kill another. Whoever violates this section, except in the manner described in 2901.01, 2901.02, 2901.03, and 2901.04 of the Revised Code, is guilty of murder in the second degree and shall be imprisoned for life.

The case law surrounding the statute identified an actual killing, intent and purpose to kill, and simple malice as elements of the crime. *State v. Butler, supra; In re Williams*, 41 Ohio App. 2d 144, 324 N.E. 2d 182 (1974).

The jury instructions also paralleled these requirements:

> Murder in the second degree is the killing of another purposely and maliciously and before you can find the defendant guilty of murder in the second degree you must find beyond a reasonable doubt, one, that John Knivic was a living person and he was killed by the defendant in Cuyahoga County on or about the 27th day of June, 1973.
>
> Two, that the killing was done purposely and maliciously.

The thrust of an inquiry under *Mullaney* and *Patterson* is whether the State has defined the elements of the crime so as to presume a fact essential to guilt and then compelled the accused to negate that element of the crime. Under this analytical framework, Ohio's law passes constitutional muster. The three elements of murder—homicide, intent and malice are not presumed; each element must be proven beyond a reasonable doubt. The jury instructions on intent and malice reflect the lack of any presumption. Rather, intent and malice may be *inferred* by the jury from the given facts and circumstances.[5] While presumptions of an element are clearly unconstitutional, permissive inferences do not fun afoul of the Constitution. *Sandstrom v. Montana*, 442 U.S. 510 (1979).

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[5]Now, purpose is a decision of the mind of knowingly doing an act with a design to accomplish a specific result.

To do an act purposely is to do it intentionally. The purpose or design with which a person does an act is usually known only to himself unless he expresses it to others or indicates it by his conduct.

A person is presumed to have a purpose or a design behind his voluntary acts unless his actions are otherwise explained by the evidence.

If a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life, the intent or purpose to kill may be inferred from the use of the weapon.

An essential element of this crime is that the act be done maliciously or with malice. Malice is a state of the mind which characterizes the doing of a wrongful, unlawful act intentionally without legal justification or excuse.

Ill-will or hostility against the person of another are not required. The word malice has a special meaning when used in law. For the purpose of these instructions, malice is the state of mind or purpose which characterizes the doing of a wrongful, unlawful act intentionally without legal justification or excuse.

Since Ohio law does not presume that any element of the crime of murder exists, *Mullaney* is not offended. *Mullaney* was grounded upon the principle established by *In re Winship:* that the state must prove each element of the crime beyond a reasonable doubt. The practice struck down in *Mullaney* offended *Winship's* notion of due process because Maine law presumed the existence of malice and placed the burden of disproving that element upon the accused. Ohio's procedure, on the other hand, did not presume malice's presence but required the State to establish it beyond a reasonable doubt.

Legal malice may include anger, ill-will or hostility against another. However, they are not required. In its legal sense, malice means the doing of a wrongful, unlawful act intentionally regardless of social duty.

The existence of malice is determined from the manner in which the act is done, the means, weapons used and from all of the other facts and circumstances in the evidence.

Where one intentionally shoots another with a weapon in a manner calculated to cause death, you may infer that the act was done maliciously.

To constitute malice in the first degree, malice must be both deliberate and premeditated.

Deliberation means the act was not the result of a sudden impulse, that some thought and consideration was given by the defendant before arriving at the purpose or intent to kill.

Premeditation means that this thought process was used and that the purpose to kill was turned over in the defendant's mind and the decision to kill made prior to the commission of the act.

There is no definite period of time that must elapse for the formation of the purpose to kill. The test is not the duration of time but the existence of the reflection. The law requires that the mind be sufficiently composed to reflect upon the killing and understand the nature and character of the act and its consequence.

If you find that the defendant actually formed the purpose to maliciously kill and deliberated and premeditated upon it before he performed the act, that is sufficient for this element of the crime.

If you find the State has proved beyond a reasonable doubt all of the essential elements of the crime of first degree murder, then your verdict must be guilty. However, if you find the State has failed to prove any one or more of the essential elements of the crime of first degree murder, then you must find the defendant not guilty of first degree murder. . . .

The jury was instructed in accordance with the statute and the guilty verdict confirms that the State successfully carried its burden of proving the elements of the crime beyond a reasonable doubt. The evidence, including that offered with respect to Carter's defense of self-defense, was insufficient to raise a reasonable doubt about his guilt as a murderer.[6] The State had satisfied the command on *In re Winship* that it prove beyond a reasonable doubt "every fact necessary to constitute the crime with which (Carter was) charged." 397 U.S. at 364. And as the Supreme Court noted in *Patterson*, 432 U.S. at 206:

> In convicting Patterson under its murder statute, New York did no more than *Leland* and *Rivera* permitted it to do without violating the Due Process Clause. Under those cases, once the facts constituting a crime are established beyond a reasonable doubt, based on all the evidence including the evidence of the defendant's mental state, the State may refuse to sustain the affirmative defense of insanity unless demonstrated by a preponderance of the evidence.

The above analysis applies with equal force to the instant case. Accordingly, under the Ohio statutes in effect at the time of petitioner's trial, it was not a due process violation for Ohio to compel a defender to shoulder the burden of proving the affirmative defense of self-defense by a preponderance of the evidence.

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[6]Proof of self-defense constitutes an absolute defense in that it renders the homicide justifiable or lawful. A finding of self-defense negates the element of unlawfulness and if the relevant statute commands a state to prove unlawfulness, then the state must prove the absence of self-defense.

Where state law includes unlawfulness or the absence of self-defense as an element of murder, the courts have held instructions putting the burden of proving self-defense upon the defendant to be constitutionally infirm under *Mullaney*. Wynn v. Mahoney, 600 F. 2d 448 (4th Cir. 1979) *cert. denied*, 444 U.S. 950 (1980); *Berrier v. Egeler*, 583 F. 2d 515 (6th Cir.) *cert. denied*, 439 U.S. 955 (1978); *Holloway v. McElroy*, 474 F. Supp. 1363 (M.D. Ga. 1979); *Cole v. Stevenson*, 477 F. Supp. 1268 (E.D.N.C. 1978) *rev'd on other grounds*, 620 F. 2d 1055 (4th Cir. 1980) (*en banc*); *Porter v. Leeke*, 457 F. Supp. 253 (D.S.C. 1978).

At first glance, it might appear that the Ohio courts consider unlawfulness to be an element of the crime of murder. In *State v. Simon*, (No. 6262 Jan. 16, 1980) the Court of Appeals of Montgomery County, Ohio considered a due process challenge to O.R.C. 2901.05(A) and concluded that because an indictment for a

III.

Petitioner also argues that his constitutional rights were violated by the admission of the testimony of Howard Sadler. Specifically, Carter submits that the testimony of Sadler 1) was unrelated to the shooting of Knific; 2) was prejudicial insofar as Sadler testified from a wheelcair; 3) was used by the prosecution solely to inflame the passions and prejudices of the jury; and 4) the jury was improperly charged about the purpose of Sadler's testimony.[7]

Petitioner attempts to raise these claims to a constitutional dimension by alleging that these errors were so prejudicial that he was denied his due process right to a fair trail. Our inquiry in reviewing this claim is directed to whether the evidence was rationally connected to the crime charged. *Manning v. Rose*, 507 F. 2d 889 (6th Cir. 1974). That connection is established here by the similarity of the crimes. Petitioner's defense was self-defense in both cases. In both cases, Carter had a deadly weapon on his person; in both, he had been drinking prior to the shooting; and in both, the victim was a homosexual with whom Carter had had a relationship.

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criminal offense must charge the general allegation of unlawfulness, the allegation of unlawfulness must be proved by the state. Since self-defense negates unlawfulness, the court held that the state cannot shift the burden of proving self-defense to the defendant. On January 22, 1980, the court issued a supplemental opinion retracting its decision with regard to the constitutionality of 2901.05(A) on the grounds that the question had not been at issue in the appeal.

In *State v. Tuncle*, (No. 38424, March 8, 1979), the Court of Appeals of Cuyahoga County gave full consideration to the due process problems associated with placing the burden of proof of self-defense on the accused. Although the constitutionality of 2901.05(A) was not before the court, the lead judge concluded that unlawfulness is a fact to be proved by the state in a prosecution for voluntary manslaughter. Thus the burden of proving self-defense could not be placed on the defendant. To reach this result the writing judge relied on the Ohio Constitution which requires that every indictment (but not statute) allege that the offense is "against the peace and dignity of the State of Ohio," finding this language to be the functional equivalent of "unlawfulness." While this result is supported by the fact that Ohio defines voluntary manslaughter as an "unlawful killing", the vitality of *Tuncle* is sapped by the express disagreement of the second judge on the panel and by the third judge who concurred only in the result.

Carter also contends that he was denied a fair trial by virtue of prosecutorial misconduct in the presentation of Sadler's testimony. The District Court rejected this claim:

> Petitioner next argues that he was denied his right to a fair trial because Sadler testified from a wheelchair, and was questioned about the extent of his injuries. The trial judge's remarks at the time Sadler was called to testify indicate that Sadler was "physically unable to take the witness chair," (Tr. 148) and therefore was permitted to testify from his wheelchair. This is not an instance, therefore, of a gratuitous attempt to inflame the passions of the jury. Certainly the fact that Sadler was in a wheelchair would have an impact on the judge's weighing of the probative value and prejudicial effect of Sadler's testimony. But this court cannot say that the decision to permit Sadler to testify from a wheelchair deprived petitioner of his right to a fair trial.
>
> As far as the prosecutor's question about the extent of Sadler's injury is concerned, this court agrees with the court of appeals that the question, though perhaps irrelevant, was not prejudicial error; and in any event did not deprive petitioner of his due process right to a fair trial. The question was a single question at the end of Sadler's testimony, and basically confirmed what must have already been obvious to the jury—that Sadler was unable to walk. Moreover, the jury was adequately

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Moreover, *Tuncle* is superseded by *State v. Newell* (No. 40470, December 28, 1979) in which the same court upheld the constitutionality of 2901.05(A) in rejecting the due process challenges discussed *supra*. *See also State v. Mascatello*, (No. 40484) (8th App. Dist. March 13, 1980). Also significant is *State v. Abner*, 55 Ohio St. 2d 251 (1978), in which the Ohio Supreme Court held a trial judge did not err in refusing to give an instruction that the prosecution must disprove the affirmative defense of self-defense beyond a reasonable doubt. Thus, the current controlling Ohio law indicates that it is not a due process violation to force a defendant to prove self-defense by a preponderance of the evidence. These recent decisions are relevant in light of the fact that the 1978 statute which they interpret imposes the same burden of proof on a defendant as was imposed on petitioner in his 1973 trial.

Allowing a State to treat self-defense as an affirmative defense is consistent with the concerns expressed in *Patterson* for allowing the legislative branch sufficient latitude to define mitigating factors that affect criminality. While forcing the state to disprove self-defense may be wise as a matter of policy, *Patterson* does not authorize judicial modification of a legislature's evidentiary standard in the absence of constitutional infirmities.

instructed on the limited purpose of Sadler's testimony. (Tr. 327). Taken in context, this question and answer provides no basis for federal habeas relief.

Finally, petitioner contends that the prosecutor's closing remarks about Sadler's testimony were so prejudicial as to deny him a fair trial. As the court of appeals held, these remarks were not relevant and were inappropriate.[4] (Footnote omitted). Nonetheless, *Donnelly v. Christofaro*, 416 U.S. 637 (1974), teaches that not every improper remark by a prosecutor is grounds for federal habeas relief. The remark must be viewed in context; in this case it was an isolated argument at the end of an otherwise unobjectionable closing argument. The jury was instructed that the remarks of counsel were not evidence (Tr. 275, 276, 324), and was further instructed about the limited purpose of Sadler's testimony (Tr. 327). Under these circumstances, the prosecutor's remark cannot be said to have "made respondent's trial so fundamentally unfair as to deny him due process." *Donnelly v. DeChristofaro, supra*, at 645.

Finally, Carter claims that evidence was insufficient to support his conviction. This claim is wholly devoid of evidentiary support as recognized by the District Court:

The record in this case clearly supports the court of appeals' determination that there was sufficient evidence to sustain a conviction of second degree murder. Among other facts supporting the finding of malice and intent to kill are the following: (1) decedent was shot three times, twice in the head and once in the abdomen; (2) just prior to the shooting, decedent called the hotel desk and seemed calm, negating the suggestion that the shooting was provoked; (3) after the shooting, Mr. Orack heard dresser drawers opening and closing, suggesting that robbery was the impetus for the shooting; (4) petitioner's explanation for the shooting, as was demonstrated in the prosecutor's closing remarks, was so inconsistent and implausible that it can hardly be said to have been beyond the province of the jury to reject it.

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[4] Insofar as petitioner's counsel attempts to relitigate these claims as a matter of state law, he evinces a fundamental misunderstanding of the nature and purpose of habeas corpus review. This court does not sit to exercise direct review over state court decisions. Rather, the scope of habeas corpus review is confined to errors of constitutional dimension. *Bell v. Am*, 536 F. 2d 123, 125 (6th Cir. 1976)

Applying the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), a review of the record in this case in the light most favorable to the prosecution shows that a rational factfinder could have found petitioner guilty beyond a reasonable doubt of murder in the second degree under Ohio law.

For the reasons stated above, the decision of the District Court denying a writ of habeas corpus is affirmed.

Kennedy, Circuit Judge, concurring in part and dissenting in part.

I concur in Judge Celebrezze's opinion with the exception of his analysis of *Wainwright v. Sykes*. I would affirm the judgment of the District Court on this ground as well for the reasons stated in my dissent in *Isaac v. Engle*, No. 78-3488, (6th Cir., 1980) (*en banc*) (Kennedy, J., dissenting).